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Criminal Procedure - Fourth Amendment - In Determining Whether an Affidavit Based upon an Informant's Tip Constitutes Probable Cause to Issue a Search Warrant, a Magistrate Is to Apply a Totality of Circumstances Approach

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Recent Developments

CRIMINAL PROCEDURE—FOURTH AMENDMENT—IN DETERMINING WHETHER AN AFFIDAVIT BASED UPON AN INFORMANT'S TIP CONSTITUTES PROBABLE CAUSE TO ISSUE A SEARCH WARRANT, A MAGISTRATE IS TO APPLY A TOTALITY OF CIRCUMSTANCES APPROACH

Illinois v. Gates (U.S. 1983)

On May 3, 1978, the Bloomingdale, Illinois Police Department received a letter from an anonymous source which asserted that Lance Gates and his wife were trafficking in illegal narcotics.[1] Detailing the modus operandi by which the Gates allegedly obtained drugs for resale in Illinois, the letter revealed that the couple would be making such a drug pick-up on or about the time the letter would be received by the Bloomingdale Police.[2] After verifying certain details contained in the informant's tip,[3] the Bloomingdale Police

1. Illinois v. Gates, 103 S. Ct. 2317, *reh'g denied*, 104 S. Ct. 33 (1983). The full text of the anonymous informant's letter provided as follows:

> This letter is to inform you that you have a couple in your town who strictly make their living on selling drugs. They are Sue and Lance Gates, they live on Greenway, off Bloomingdale Rd. in the condominiums. Most of their buys are done in Florida. Sue his wife drives their car to Florida, where she leaves it to be loaded up with drugs, then Lance flys [sic] down and drives it back. Sue flys [sic] back after she drops the car off in Florida. May 3 she is driving down there again and Lance will be flying down in a few days to drive it back. At the time Lance drives the car back he has the trunk loaded with over $100,000.00 in drugs. Presently they have over $100,000.00 worth of drugs in their basement.
>
> They brag about the fact they never have to work, and make their entire living on pushers.
>
> I guarantee if you watch them carefully you will make a big catch. They are friends with some big drugs [sic] dealers, who visit their house often.
>
> Lance & Susan Gates
> Greenway
> in Condominiums

Id. at 2325.

2. *Id.* The letter was received by the Bloomingdale Police on the same day on which the anonymous informant asserted that Sue Gates would be departing for Florida to pick up illegal narcotics. *Id.*

3. *Id.* Detective Charles Mader of the Bloomingdale Police Department contacted a confidential informant who corroborated that Lance Gates resided at the address indicated in the informant's letter. People v. Gates, 82 Ill. App. 3d 749, 751, 403 N.E.2d 77, 79 (1980). Further, a police officer assigned to O'Hare International Airport informed Mader that "L. Gates" held an airline reservation for a flight

contacted the United States Drug Enforcement Agency (DEA) for assistance.[4] The DEA further corroborated the tip, observing that Lance Gates had flown to Florida, met his wife at a hotel and left with her by car the following morning.[5] On the basis of the foregoing information, an Illinois circuit court judge issued a search warrant for both the Gates' home and automobile.[6] Upon their return from Florida, the Gates were met at their home by the Bloomingdale Police.[7] A search of the couple's home and automobile resulted in the seizure of over 350 pounds of marijuana.[8]

The Illinois Circuit Court for DuPage County granted the defendants' motion to suppress the fruits of the search of their home and automobile on the ground that the issuance of the search warrant was not based upon probable cause.[9] This decision was affirmed by the Illinois Appellate Court for the Second District,[10] and in turn by a divided vote of the Supreme Court of

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scheduled to depart on May 5, from Chicago, Illinois to West Palm Beach, Florida. 103 S. Ct. at 2325.

4. 103 S. Ct. at 2325. Detective Mader had made arrangements with a DEA agent for surveillance of the May 5 airline flight on which Lance Gates held a reservation. *Id.*

5. *Id.* at 2325-26. A DEA agent stationed at O'Hare Airport informed Detective Mader that a man matching the physical description of Lance Gates and using Gates' name had boarded a flight to West Palm Beach, Florida. 82 Ill. App. 3d at 751-52, 403 N.E.2d at 79. A second DEA agent, stationed in Florida, had observed Gates travel by taxi from the West Palm Beach airport to a nearby Holiday Inn, where Gates entered a room registered to Susan Gates. 103 S. Ct. at 2325-26.

At 7:00 a.m. on May 6, the Florida DEA agent observed Gates and an unidentified woman leave the hotel and get into a Mercury automobile bearing Illinois license plates. *Id.* Although the Mercury automobile had a license plate number registered to Lance Gates, the number was registered for a different car, a Hornet station wagon. *Id.* at 2326. The car was then observed driving "northbound on an interstate frequently used by travelers to the Chicago area." *Id.*

6. 103 S. Ct. at 2326. Detective Mader signed an affidavit setting forth the operative facts, and submitted it to the circuit judge along with a copy of the informant's letter. *Id.* For the full text of Mader's affidavit, see *People v. Gates*, 82 Ill. App. 3d at 755-57, 403 N.E.2d at 82-83.

7. 103 S. Ct. at 2326. The Gates reached their suburban Chicago home at 5:15 a.m. on March 7, 1978, driving the same car in which they had left Florida some 22 hours earlier. *Id.*

8. *Id.* The police found approximately 350 pounds of marijuana in the Gates' automobile. *Id.* A search of the house uncovered over 20 pounds of marijuana, several rifles, a handgun, and scales used to weigh the drugs. 82 Ill. App. 3d at 752, 403 N.E.2d at 79-80. Police also discovered that the Gates had cocaine in their possession. *Id.* at 381, 423 N.E.2d at 889.

9. 103 S. Ct. at 2326. The Gates were indicted for unlawful possession of marijuana with the intent to distribute as well as unlawful possession of a controlled substance. 85 Ill. 2d at 381, 423 N.E.2d at 889. Lance Gates was separately indicted for possession of a firearm without a license. *Id.*

10. 82 Ill. App. 3d at 749, 403 N.E.2d at 77. A unanimous court held that since the affidavit did not set forth any of the underlying circumstances from which the anonymous informant had concluded that the Gates were involved in illegal activity, the affidavit of Detective Mader failed to satisfy the "basis of knowledge prong." *Id.* at 753-55, 403 N.E.2d at 80-81 (citing Aguilar v. Texas, 378 U.S. 108 (1964)). For a discussion of the "basis of knowledge" prong in *Aguilar*, see notes 46 & 55-60 and accompanying text *infra*. The Illinois court stated that the issue of the "veracity" of

Illinois.[11] On writ of certiorari,[12] the United States Supreme Court reversed, *holding* that in determining whether an informant's tip establishes probable cause for issuance of a warrant, a magistrate is to make a common sense, practical decision based on the totality of the circumstances set forth in the affidavit before him. *Illinois v. Gates*, 103 S. Ct. 2317, *reh'g denied*, 104 S. Ct. 33 (1983).

The fourth amendment to the United States Constitution requires that a valid arrest or search warrant be issued only upon an affidavit or complaint which sets forth facts establishing probable cause.[13] The probable

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the informant was not necessary to reach, since it had already decided that the tip failed the basis of knowledge prong. 82 Ill. App. 3d at 755, 403 N.E.2d at 81. For a discussion of *Aguilar*'s "veracity" prong, see notes 46 & 61-62 and accompanying text *infra*.

11. 85 Ill. 2d at 376, 423 N.E.2d at 887. A 5-2 majority of the Illinois Supreme Court held that the informant's tip did not pass either of the *Aguilar* prongs. *Id.* at 390, 423 N.E.2d at 893.

12. The Supreme Court originally granted certiorari to determine whether a partially corroborated anonymous tip could furnish the basis for probable cause. 103 S. Ct. at 2321. The Supreme Court later requested reargument so that the parties could address the issue of

> [w]hether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment, should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the *reasonable belief* that the search and seizure at issue was consistent with the Fourth Amendment.

Id. (citations omitted) (emphasis added). The Supreme Court made this request after previously denying the State's motion to enlarge the scope of the issues presented for review to address this very question. Illinois v. Gates, 455 U.S. 986 (1982). *See* Illinois v. Gates, 103 S. Ct. 436 (1982) (Stevens, J., dissenting from order restoring case to calendar for reargument). However, in the *Gates* opinion, Justice Rehnquist stated for the majority that "with apologies to all," the Court declined to address the good faith exception issue. 103 S. Ct. at 2321. For a discussion of the *Gates* Court's reasoning in declining to address the issue of a good faith exception to the exclusionary rule, see note 76 *infra*.

The Supreme Court has recently granted certiorari and heard argument on two cases which deal with the issue of a possible good faith exception to the exclusionary rule. *See* Massachusetts v. Sheppard, No. 82-963 (certiorari granted, 51 U.S.L.W. 3919 (U.S. June 27, 1983)); United States v. Leon, No. 82-1771 (certiorari granted, 51 U.S.L.W. 3919 (U.S. June 27, 1983)). The two lower court opinions are Commonwealth v. Sheppard, 387 Mass. 448, 441 N.E.2d 725 (1982) (en banc) (items seized pursuant to warrant which failed to satisfy particularity requirement of the fourth amendment); and United States v. Leon, 701 F.2d 187 (9th Cir. 1983) (evidence seized on good faith reliance on search warrant that was subsequently held to be defective). For a discussion of the exclusionary rule, see notes 17-19 and accompanying text *infra*.

13. U.S. CONST. amend. IV. The fourth amendment provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id. The protections of the fourth amendment are applied to the states through the fourteenth amendment. Ker v. California, 374 U.S. 23, 33 (1963).

While the fourth amendment does not expressly address *warrantless* searches or

cause requirement was drafted into the language of the fourth amendment as a means of protecting citizens from unjustified intrusions into their private lives.[14] A corollary of this protection is that the existence of probable cause is to be determined "by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."[15] Finally, to insure that it is the magistrate who determines the existence of probable cause, the Supreme Court has emphasized that police should not attempt to make a warrantless search or arrest, subject to several "jealously and carefully drawn" exceptions.[16]

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arrests, the Supreme Court has interpreted the Constitution as requiring warrantless searches or arrests to be based on no lesser standard of proof than those searches and arrests conducted pursuant to a warrant. *See* Jones v. United States, 362 U.S. 257 (1960). If the standard were lower in the case of warrantless searches or arrests, there would indeed be little, if any, incentive for police officers to resort to the constitutionally preferred process of obtaining a warrant. *Id.* at 270.

It is generally accepted that the same amount of proof is required to establish probable cause to arrest as is required to establish probable cause to search. Y. KAMISAR, W. LAFAVE & J. ISRAEL, BASIC CRIMINAL PROCEDURE 268 (5th ed. 1980); Comment, *The Informer's Tip as Probable Cause for Search or Arrest*, 54 CORNELL L. REV. 958, 958 & n.2 (1969). For an arrest to be valid there must be probable cause to believe that (1) a crime has been committed and (2) the suspect has committed that crime. Y. KAMISAR, W. LAFAVE & J. ISRAEL, *supra*, at 268. For a search to be valid, there must be probable cause to believe that certain fruits, instrumentalities, or evidence of a crime are presently located at a specified place. *Id.* This requirement that there be probable cause to believe that the evidence is *presently* at the location specified presents its own peculiar problems. For instance, an affidavit that states that an individual purchased drugs from a suspect at the suspect's residence a month ago, does not present sufficient probability that drugs are to be found there at the present time. *See* Commonwealth v. Simmons, 450 Pa. 624, 630-32, 301 A.2d 819, 822-23 (1973).

14. Mapp v. Ohio, 367 U.S. 643, 647 (1961). Various justices have recognized the difficulty of ensuring the protections of the fourth amendment. *See, e.g.*, Draper v. United States, 358 U.S. 307, 314 (1959) (Douglas, J., dissenting) ("[a] rule protective of law-abiding citizens is not apt to flourish where its advocates are usually criminals"); Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting) ("[s]ince the officers are themselves the chief invaders, there is no enforcement outside of court").

15. Johnson v. United States, 333 U.S. 10, 14 (1948) (footnote omitted). Indeed, if the police officers could make the determination themselves, the fourth amendment's purpose as a check against unbridled discretion of law enforcement would be rendered a nullity. *Id.* at 13-15. Even the presence of a magistrate is not sufficient to ensure fourth amendment protections. The magistrate is required to be neutral and detached, rather than merely serving as a rubber stamp for police. United States v. Ventresca, 380 U.S. 102, 109 (1965). *See also* Rooker v. Commonwealth, 508 S.W.2d 570 (Ky. 1974) (where magistrate does not perform his neutral and detached function, evidence obtained pursuant to warrant must be excluded, despite the fact that affidavit actually establishes probable cause). In reviewing a magistrate's determination of probable cause, it is axiomatic that a reviewing court may only consider information brought to the magistrate's attention. Spinelli v. United States, 393 U.S. 410 (1969).

16. Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971) (quoting Jones v. United States, 357 U.S. 493, 499 (1958)). For a list of the exceptions to the warrant requirement, see Texas v. Brown, 103 S. Ct. 1535, 1539 (1983). The Supreme Court has, on many occasions, expressed its preference for warrants. *See, e.g., id.*; United

When evidence is seized in contravention of the fourth amendment, it is suppressed by a court under the exclusionary rule,[17] a judicially-created remedy fashioned by the Supreme Court[18] to deter future police conduct that is in violation of constitutional standards.[19]

States v. Ventresca, 380 U.S. 102, 106-07 (1965) (search warrant); Beck v. Ohio, 379 U.S. 89, 96 (1964) (arrest warrant). In fact, the Court has suggested "that in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fail." *Ventresca*, 380 U.S. at 106 (citing Jones v. United States, 362 U.S. 257, 270 (1960)). With the exception of this "marginal case" it is generally accepted that the quantum of proof required to conduct a warrantless search or arrest is the same as that required to conduct them pursuant to a warrant. *See* Comment, *supra* note 13, at 958 n.2.

17. Of course, the exclusionary rule also requires the suppression of evidence obtained in violation of other constitutional protections, such as the right to counsel and the privilege against self-incrimination. *See* Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 951 (1965). *See also* Ohio v. Roberts, 448 U.S. 56 (1980) (sixth amendment confrontation clause); United States v. Wade, 388 U.S. 218 (1967) (sixth amendment right to counsel); Miranda v. Arizona, 384 U.S. 436 (1966) (fifth amendment right against self-incrimination).

18. *See* Weeks v. United States, 232 U.S. 383 (1914). *Weeks* made the exclusionary rule applicable to the federal government. *Id.* at 398. The rule was made applicable to the states in 1961. *See* Mapp v. Ohio, 367 U.S. 643 (1961). For a discussion of the development of the rule, see Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives*, 1975 WASH. U.L.Q. 623, 625-40.

19. *See generally* Note, *The Exclusionary Rule Will Not Operate in Circumstances Where the Officer's Violation Was Committed in the Reasonable, Good Faith Belief That His Actions Were Legal*, 27 VILL. L. REV. 211 (1981). The Supreme Court has made clear that the exclusionary rule is not itself a personal constitutional right. *See* United States v. Calandra, 414 U.S. 338, 347-48 (1974); Note, *supra*, at 215. In addition to providing a deterring effect on unlawful police conduct, the rule has also been justified as necessary to maintaining judicial integrity. Note, *supra*, at 215 n.27. This latter rationale emphasizes that courts should not use improperly obtained evidence "to avoid the taint of partnership in official lawlessness." *Calandra*, 414 U.S. at 357 (Brennan, J., dissenting).

Recently, the exclusionary rule has come under some attack for its indiscriminant application to evidence obtained from searches in technical violation of constitutional protections. *See* Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L.& C. 635 (1978). Some commentators have urged an exception to the exclusionary rule where the police have acted in the reasonable, but erroneous belief that their conduct was lawful. *See* Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736 (1972); Note, *supra*, at 213-14, 223. The argument suggests that when police have acted in the reasonable belief that their conduct was lawful, the application of the rule in such circumstances ignores its purpose of deterrence. Note, *supra*, at 214 n.18, 222.

Various members of the Supreme Court have also voiced their concern over the application of the rule when police have reasonably believed they were complying with the law. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 496 (1976) (Burger, C.J., concurring); *id.* at 536-38 (White, J., dissenting); Brown v. Illinois, 422 U.S. 590, 606 (1975) (Powell, J., concurring in part). *See also* United States v. Peltier, 422 U.S. 531, 542 (1975) (Rehnquist, J.) ("[i]f the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment").

For arguments in opposition to a good faith exception to the exclusionary rule, see Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulat-*

Although it is clear that "probable cause" is required for the issuance of a valid search warrant, what those words entail and how they should be applied to different factual situations is less certain.[20] In *Carroll v. United States*,[21] the Supreme Court set down the general standard: it exists where a police officer has reasonably trustworthy information of facts and circumstances which would warrant a man of reasonable caution to believe that an offense has been or is being committed.[22] In *Brinegar v. United States*,[23] the Court made clear that probable cause was not a technical standard; rather it concerned "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."[24]

Likewise the information which must be contained in an affidavit to support a finding of probable cause has been the source of much judicial concern. In *Nathanson v. United States*,[25] the Supreme Court stressed the importance of maintaining magistrate neutrality in the context of an affidavit based entirely on the observations of the affiant-police officer.[26] The Court stated that an affiant-police officer must present to a magistrate the facts or circumstances from which the affiant derived his suspicion that contraband was in a particular place.[27]

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ing the Police and Derailing the Law, 70 GEO. L.J. 365 (1981). For a discussion of the *Gates* Court's decision not to address the issue of a good faith exception, see note 12 *supra* and note 76 *infra*. For a discussion of Justice White's analysis of this issue in *Gates*, see note 104 and accompanying text *infra*.

20. *See* Note, *Hearsay as Grounds for Probable Cause*, 21 CASE W. RES. L. REV. 135 (1969). This commentator noted, "The predominant feature of search and seizure law is uncertainty. . . . It [is] a field 'replete with complexities.'" *Id.* at 138 n.10 (quoting U.S. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE: TASK FORCE REPORT: ORGANIZED CRIME 105 n.408 (1967)).

21. 267 U.S. 132 (1925).

22. *Id.* at 162. In one of the Court's earliest pronouncements on probable cause, Chief Justice Marshall stated that the term "means less than evidence which would justify condemnation. . . . It imports a seizure made under circumstances which warrant suspicion." Locke v. United States, 11 U.S. (7 Cranch) 339, 348 (1813). Probable cause has been interpreted to mean more probable than not. *See generally*, 1 W. LAFAVE, SEARCH AND SEIZURE § 3.2 (1978 & Supp. 1984).

23. 338 U.S. 160 (1949).

24. *Id.* at 175. Despite this flexible standard, the *Brinegar* Court stated that probable cause required more than mere suspicion, contrary to those views expressed by Chief Justice Marshall in *Locke*. *Id.* at 175-76 (citing Locke v. United States, 11 U.S. (7 Cranch) 339, 348 (1813)).

25. 290 U.S. 41 (1933).

26. *Id.* at 47. The affidavit in *Nathanson* stated that the affiant suspected and believed that contraband liquor was located at a specified residence. *Id.* at 44.

27. *Id.* at 47. The Supreme Court subsequently reaffirmed the principles of its holding in *Nathanson*. *See* Giordenello v. United States, 357 U.S. 480 (1958). In *Giordenello*, a policeman found heroin in the possession of the defendant while conducting a search incident to an arrest which had been made pursuant to a warrant. *Id.* at 481-82. The arrest warrant was issued based on a statement by the officer-affiant that Giordenello had received illegal narcotics, and implying that specified witnesses were available to substantiate this charge. *Id.* at 481.

In invalidating the arrest warrant, the Court stated that since the affidavit did not reveal the source of the affiant's conclusion, "it [was] difficult to understand how

When facts and circumstances not within the direct knowledge of the affiant-officer are presented in the affidavit as a means of establishing probable cause,[28] special problems of veracity arise.[29] The Supreme Court first

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the Commissioner could [have been] expected to assess independently the probability that petitioner [had] committed the crime charged." *Id.* at 486-87. The Court noted that, because the information in the affidavit was insufficient to establish probable cause, it was unnecessary to decide the issue of whether a warrant could be issued strictly on the basis of hearsay information. *Id.* at 485.

28. Not all seizures require probable cause in order to satisfy the requirements of the fourth amendment. *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968). In *Terry*, the Court held that police may conduct a limited stop and pat down of the outer clothing of a suspect for the purpose of ascertaining whether the suspect has a weapon. *Id.* at 30. The *Terry* stop is thus a less intrusive "seizure" and does not require probable cause, but merely a showing of "reasonable suspicion." *Id.* at 20-22, 30. An officer is justified in conducting a *Terry* stop and frisk when he "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous. . . ." *Id.* at 30.

The Supreme Court has had occasion to pass upon the use of an informant's tip as the basis for a *Terry* stop. *See* Adams v. Williams, 407 U.S. 143 (1972). In *Williams*, the arresting officer testified at trial that a person with whom he was acquainted told him that an individual seated in a nearby car had a handgun on his waistband and was in possession of narcotics. *Id.* at 144-45. At 2:15 a.m., the officer was on patrol in a "high-crime area" in Bridgeport, Connecticut. *Id.* at 144. The officer approached the vehicle and tapped on the car window. *Id.* at 145. He asked Williams, who was sitting in the front seat on the passenger side, to step out of the car. *Id.* Instead, Williams rolled down the window, whereupon the officer reached into the car and removed a loaded revolver from Williams' waistband. *Id.* The officer testified that the revolver had not been visible to him. *Id.*

The majority opinion in *Williams* noted that, although under the Court's prior cases the unverified tip might have been insufficient to establish probable cause, it contained enough "indicia of reliability" as to justify a limited search of the suspect for the police officer's own protection. *Id.* at 146-47. The Court pointed out that the tip was made by one who "came forward personally" to the officer and thus was "a stronger case than obtains in the case of an anonymous telephone tip." *Id.* at 146. The Court noted that pursuant to a Connecticut statute, the informant would have been committing a criminal offense had he been making a fallacious charge. *Id.* at 146-47. This entitled his tip to more credibility. *Id.* at 147. For a discussion of *Williams*, see *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 52, 171-81 (1972).

29. *See* Aguilar v. Texas, 378 U.S. 108, 113-14 (1964). The informant, unlike the police officer-affiant, will not have given his information under oath. Furthermore, he may stand to benefit personally by giving information to the police. He may, for example, receive offers of less harsh sentencing in exchange for cooperation, or cash payments for each tip he provides. Rebell, *The Undisclosed Informant and the Fourth Amendment: A Search for Meaningful Standards*, 81 YALE L.J. 703, 713 (1972). The problem is compounded in the case of an anonymous informant. Comment, *Anonymous Tips, Corroboration, and Probable Cause: Reconciling the* Spinelli/Draper *Dichotomy in* Illinois v. Gates, 20 AM. CRIM. L. REV. 99, 107 (1982). When the informant is anonymous, neither the magistrate nor the police are able to question the informant's basis of knowledge or veracity. *Id.* at 107-08. His motivation may range from "a sense of civic duty, revenge, or a desire to eliminate criminal competition." *Id.* at 107. Therefore, one commentator has suggested that an anonymous informant be treated as "presumptively unreliable." *Id.*

Nevertheless, informants' tips provide a very valuable tool in law enforcement. Rebell, *supra*, at 703 n.3. Informants' tips probably serve as the basis for over half the search warrants that are issued. *Id.* Many of these tips are from anonymous infor-

addressed the use of an informant's tip in an affidavit as a means of establishing probable cause for a search warrant[30] in *Jones v. United States*.[31] In *Jones*, the Court held that an informant's tip could furnish the grounds for probable cause so long as there was a "substantial basis" for crediting the informant's report.[32] The "substantial basis" in *Jones* consisted of a tip from a previously reliable confidential informant that purported to be based on the informant's personal observations.[33] In addition, the information had been partially corroborated both by other informants and by the police officer-affiant.[34] While holding that this information was sufficient to furnish probable cause, the Court cautioned that since the mere belief of an affiant-police officer that contraband was located in a particular place had previously been considered insufficient to establish probable cause for the issuance of a search warrant, an affidavit based on hearsay information comprising mere belief was similarly defective.[35]

Three years later, in *Ker v. California*,[36] the Court upheld a warrantless arrest of a suspect, which was made after a police officer received information from a reliable informant.[37] In *Ker*, the Court noted that, as in *all* deter-

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mants. *Id.* A study of one Connecticut city during the 1968-69 period revealed that anonymous tips provided the basis for 73% of search warrants issued for one year and 63% for the following year. *Id.* The use of informants' tips is especially prevalent in narcotics cases. *Id.* In the same study, 90% of warrants issued for narcotics searches were based on informants' tips in one year, while the figure was 83% for the following year. *Id.*

30. The Supreme Court had previously allowed an informant's tip to provide probable cause for a warrantless arrest. *See* Draper v. United States, 358 U.S. 307 (1959). For a discussion of *Draper*, see notes 57-60 & 62 and accompanying text *infra*.

31. 362 U.S. 257 (1960).

32. *Id.* at 269. The Court stated that the information need not be such as to be competent evidence in a trial in order to serve as the basis for establishing probable cause. *Id.* at 270 (citing *Brinegar*, 338 U.S. at 160). Therefore, "hearsay" information could furnish the grounds for probable cause. *Id.* at 269-71.

33. *Id.* at 267-68 n.2. In *Jones*, a police search of the residence at which defendant had been staying uncovered narcotics. *Id.* at 258-59. The search warrant for these premises was based largely upon an informant's tip that narcotics would be found at certain places on the premises, including under a pillow, on a dresser, and on a window ledge. *Id.* at 268 n.2. The informant, who had stated that he had purchased drugs from the defendant at these premises on numerous occasions, was described by the affiant-officer as previously having given correct information. *Id.*

34. *Id.* The affidavit indicated that the defendant previously had admitted being a user of narcotics to the affiant, who had observed needle marks on the defendant's arm. *Id.*

35. *Id.* at 269. For a discussion of the *Nathanson* Court's discussion on the propriety of issuing a warrant based on the mere conclusory affidavit of a police officer, see notes 25-27 and accompanying text *supra*.

36. 374 U.S. 23 (1963).

37. *Id.* at 36. In *Ker*, two police officers had watched Ker meet a known drug dealer at the same spot where an undercover agent had, on the previous evening, observed that dealer make a sale. *Id.* at 26-27. The arresting officers had also received information that Ker was distributing drugs from his apartment. *Id.* at 27. In addition, one specified informant, who had previously given information which had led to three arrests, stated that he and Ker had purchased marijuana from one Murphy on several occasions. *Id.* Because the independent investigation by police re-

minations of whether a search was reasonable, the decision depends on the facts and circumstances of each particular case.[38] Then, in *Rugendorf v. United States*,[39] the Court held that a reliable informant's tip that described in detail alleged contraband which he had personally observed, was a sufficient basis for the issuance of a search warrant.[40] The Court expressly relied on the substantial basis approach of *Jones*.[41]

In *Aguilar v. Texas*,[42] the Supreme Court refined the requisite showing to establish probable cause for the issuance of a search warrant by attempting to offer more specific guidelines.[43] In *Aguilar*, a search warrant was issued on

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vealed incriminating activity, the Court stated that to assert that probable cause was established was "to indulge in understatement." *Id.* at 36.

38. *Id.* at 33. *Ker* rejected the notion that there was any formula to apply in determining whether fourth amendment requirements have been met. *Id.* It appears, however, that the tip in *Ker* could have passed the "formula" for determining the sufficiency of an affidavit which was set forth in a subsequent Supreme Court decision. *See* Aguilar v. Texas, 378 U.S. 108 (1964). The informant's information derived from first-hand knowledge acquired from his own purchase of drugs. *Ker*, 374 U.S. at 27. Furthermore, the informant was stated to be reliable and his information was corroborated in part by police. *Id.* at 26-27. For a discussion of *Aguilar*, see notes 42-46 and accompanying text *infra*.

39. 376 U.S. 528 (1964).

40. *Id.* at 533. In *Rugendorf*, the defendant was convicted of receiving 81 stolen fur pieces after stolen furs were found in his basement pursuant to a valid search warrant. *Id.* at 531. Officer Moore, the affiant, stated that a confidential informant, who had previously supplied him with reliable information, described furs which the informant had seen in Rugendorf's basement. *Id.* at 530. The informant's detailed description matched the description of the furs that had been reported stolen. *Id.* The informant was told at the time he observed the furs that they had been stolen. *Id.*

41. *Id.* at 533.

42. 378 U.S. 108 (1964).

43. *Id.* at 114. *Aguilar* did not overrule *Jones*, although it offered a more specific test. Moylan, *Hearsay and Probable Cause: An* Aguilar *and* Spinelli *Primer*, 25 MERCER L. REV. 741 (1974). *Aguilar* "spell[ed] out what 'a substantial basis for crediting the hearsay' would be." *Id.* at 745. *See also* Rebell, *supra* note 29, at 705. The tip in *Jones* probably could have passed the *Aguilar* standard. *See* Note, *Probable Cause and the First-Time Informer*, 43 U. COLO. L. REV. 357, 364 n.32 (1972). While there was no question that the basis of the informant's belief was set forth in the affidavit in question in *Jones*, there may be some doubt as to whether the *Jones* informant was sufficiently credible to satisfy the second requirement in *Aguilar*. The statement by the affiant that the informant previously had given accurate information appears somewhat conclusory. Comment, *Informer's Word as the Basis for Probable Cause in the Federal Courts*, 53 CALIF. L. REV. 840, 846 (1965). Concededly, such a statement does not detail some of the underlying circumstances so as to allow a magistrate to make an independent appraisal of the informant's credibility. Still, it appears that the mere assertion by the affiant that the informant previously has supplied accurate information satisfies the credibility requirement of *Aguilar*. Comment, *supra* note 13, at 963 n.28. For a discussion of *Jones*, see notes 31-35 and accompanying text *supra*.

Similarly, the tip in the Court's other case applying the "substantial basis" approach could pass the test formulated in *Aguilar*. *See Rugendorf*, 376 U.S. at 528. In *Rugendorf*, the informant's detailed description of stolen furs was purportedly based on his personal observations. *Id.* at 530. Furthermore, the affiant swore that the informant had provided reliable information in the past. *Id.* For a discussion of *Rugendorf*, see notes 39-41 and accompanying text *supra*.

the basis of affidavits from two police officers. In their affidavits, the officers stated that they had "received reliable information from a credible person" that heroin and other illegal drugs were located at a specified residence.[44] The Court invalidated the search warrant, reasoning that because the affidavits merely stated the conclusions of the affiants, there was no way the magistrate could have made an independent determination of probable cause.[45] While the *Aguilar* Court acknowledged that probable cause could be supplied by an affidavit based on the hearsay information of an informant, the Court required that the affidavit disclose the following: 1) the "underlying circumstances" upon which the informant based his conclusion; and 2) the affiants' reasons for believing that the informant was "credible" or his information "reliable."[46]

In *United States v. Ventresca*,[47] the Supreme Court had occasion to caution that under the two-part *Aguilar* test, courts should not hold a search warrant invalid by interpreting the affidavit[48] in a hypertechnical manner[49]

44. *Aguilar*, 378 U.S. at 109. The requirements of *Aguilar* have been referred to as a "two-pronged" test. *See* Spinelli v. United States, 393 U.S. 410, 413 (1969). The requirement that the affidavit disclose some of the underlying circumstances upon which the informant based his conclusion has been referred to as the "basis of knowledge" prong. Stanley v. State, 19 Md. App. 507, 513, 313 A.2d 847, 851 (1974); Comment, *supra* note 13, at 960. The requirement that the affidavit set forth the affiant's reasons for believing that the informant was "credible" or his information "reliable" has been referred to as the "veracity" prong. *Stanley*, 19 Md. App. at 512, 313 A.2d at 850; Comment, *supra* note 29, at 102.

45. *Aguilar*, 378 U.S. at 113-16. While the Court recognized that a reviewing court should pay "substantial deference" to a magistrate's determination of probable cause, a court must nevertheless ensure that the magistrate was not merely serving as a "rubber stamp" for the police. *Id.* at 111.

46. *Id.* at 114. *Aguilar* appears to have been a logical progression from the Supreme Court's decision in *Nathanson*. *See Nathanson*, 290 U.S. at 41. The requirement that some of the underlying circumstances of the informant's basis for his belief be set forth in the affidavit is similar to the requirement in *Nathanson* that an officer-affiant set forth the circumstances underlying his belief. *See The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 178 (1969).

In a footnote, the *Aguilar* Court noted the danger of having one rule for an affidavit based on an informant's tip and another rule for an affidavit based merely on the affiant's belief. *Aguilar*, 378 U.S. at 114 n.4. That is, a police officer could avoid the impact of *Nathanson*, which rejected warrants based on an affiant's mere conclusion or belief that there was contraband in a particular place, by relaying his conclusion to another officer who could then obtain a "warrant by swearing that he had 'received reliable information from a credible person.' " *Id.* As the informant, unlike the police officer-affiant, is not under oath, there is the additional requirement that some of the underlying circumstances reveal that the informant is credible. *The Supreme Court, 1968 Term, supra*, at 178. For a discussion of *Nathanson*, see notes 25-27 and accompanying text *supra*.

47. 380 U.S. 102 (1965).

48. The affidavit in *Ventresca*, based on investigations conducted by the affiant and other agents from the Internal Revenue Service, indicated that the defendant was operating an illegal alcohol distillery. *Id.* at 103-04. The affidavit stated that 60-pound bags of sugar had been observed being delivered by car to defendant's house. *Id.* at 104. Empty five-gallon cans were seen being delivered to the house, filled up, and subsequently sent out from the house by car. *Id.* In addition, investigators had "smelled the odor of fermenting mash" and heard "certain metallic noises" and

once some of the underlying circumstances supporting the affiant's belief have been set forth.[50]

"sound similar to that of a motor or pump" emanating from the direction of the defendant's house. *Id.*

49. *Id.* at 109. The warrant had been invalidated by the court of appeals because the affidavit did not specifically state that the information in the affidavit was based on observations of the affiant or other investigators. *Id.* at 109-10. Thus, the court of appeals reasoned that the affidavit could have been based on hearsay from unreliable informants. *Id.* at 104-05.

50. *Id.* at 109. The Court stressed a common-sense approach in the interpretation of an affidavit, recognizing the fact that affidavits are normally drafted by nonlawyers in situations where time is often of the essence. *Id.* at 108. Therefore, an affidavit did not require the "elaborate specificity once exacted under common law pleadings." *Id.*

The *Ventresca* Court's admonition did not appear to go to the quantum of proof necessary to establish probable cause. *See id.* at 107-09. Rather, the Court recognized that to satisfy the *Aguilar* test, the underlying circumstances of the assertion that contraband was in a particular place had to be set forth. *Id.* at 108-09 (citing *Aguilar*, 378 U.S. 108 (1964)). But once *Aguilar's* test was met, the warrant should not be invalidated by a hypertechnical scrutiny of the affidavit. *Id.* at 109.

That *Ventresca*'s import was more towards the form of the information in the affidavit than its substance is revealed in the Court's opinion. The court of appeals' objection to the affidavit was that a magistrate could not be certain whether the details set forth were observed personally by investigators or whether they were the observations of potentially unreliable informants. *Id.* at 104-05. The Supreme Court reasoned that in reading the affidavit as a whole, it was evident that the observations had been made by the investigators themselves. *Id.* at 110-11. In short, the *Ventresca* Court was just recognizing that "[a] policeman's affidavit should not be judged as an entry in an essay contest." Spinelli v. United States, 393 U.S. 410, 438 (1969) (Fortas, J., dissenting).

The facts of *Ventresca* do not appear inconsistent with *Aguilar*. As the *Ventresca* Court stated, a fair reading of the affidavit revealed that the information was obtained by the eyewitness investigation of the IRS agents. *Ventresca*, 380 U.S. at 110-11. The credibility requirement of *Aguilar* was established since IRS agents may be presumed to be truthful. Comment, *supra* note 13, at 961.

The *Ventresca* Court appeared to equate the *Jones* substantial basis approach with *Aguilar*'s more specific guidelines. *Ventresca*, 380 U.S. at 108. From the Court's discussion of the two cases, *Aguilar* implicitly defined what constituted a substantial basis for crediting the informant's tip. *See id.*

In a decision following *Ventresca*, the Court again emphasized the importance of magistrate neutrality in determining probable cause in an application for a warrant. *See* Jaben v. United States, 381 U.S. 214 (1965). In *Jaben*, a complaint sworn by an IRS agent alleged that Jaben had intentionally filed false income tax returns. *Id.* at 221-22. The agent derived this conclusion from his investigation of Jaben's prior income tax returns, from other records of Jaben's income, and through interviewing third parties who had knowledge of Jaben's financial condition. *Id.* The Court upheld the complaint as establishing probable cause, despite the fact that the affiant was not specific in stating the basis for his knowledge. *See id.* at 225. Nevertheless the Court's liberality in construing the probable cause standard is somewhat qualified by the circumstances in *Jaben*. The Court noted that the crime of tax evasion is not the type of crime "that can be physically observed." *Id.* Under such circumstances, the Court noted, a magistrate may be justified in accepting the arguably conclusory statement of the affiant. *Id.*

Although there was admittedly no statement in the affidavit concerning the credibility of the individuals the affiant had interviewed, this was also not a bar to establishing probable cause. *Id.* at 224. The Court distinguished the credibility of

In *Spinelli v. United States*,[51] the Supreme Court, faced with an affidavit based on hearsay information, expressly rejected an analysis that would focus upon the totality of circumstances[52] as the basis for establishing probable cause for a search warrant.[53] Rather, the Court explicated *Aguilar*'s two-pronged test,[54] providing additional means whereby each prong could be satisfied. According to the *Spinelli* Court, the "basis of knowledge" prong could be satisfied if an informant's tip was sufficiently detailed that a magistrate might infer from the affidavit that it was based on more than casual rumor.[55] Thus, if an informant's tip failed to set forth the manner in which the information was obtained, the tip could nevertheless be saved by suffi-

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informants in tax evasion cases from the credibility of informants in narcotics cases or "other common garden varieties of crime." *Id.* According to the Court, informants in tax evasion cases were less likely to lie than informants in crimes involving narcotics violations. *Id.* While the Court failed to state why there should be a difference in the presumption of credibility depending on the offense charged, the answer may be suggested by one commentator. *See* Rebell, *supra* note 29, at 712. It has been suggested that in narcotics cases the informant is typically a drug addict, or drug purchaser, who agrees to supply information to police in exchange for leniency in his own prosecution. *Id.*

51. 393 U.S. 410 (1969). For a discussion of *Spinelli*, see *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 177-81 (1969); Note, *supra* note 20, at 135-47.

52. *Spinelli*, 393 U.S. at 415. *Spinelli*'s rejection of such an approach appears inconsistent with the Court's earlier formulation of probable cause in *Ker*. *See Ker*, 374 U.S. at 23. The difference between the Court's two approaches may lie in the fact that in *Ker*, the police officers' independent observations in themselves indicated suspicious conduct on the part of the suspect. *Id.* at 35. For a discussion of the affidavit in *Ker*, see note 37 *supra*. Thus, the observation in *Ker*, quite apart from the informant's tip, was a circumstance to be considered in the probable cause analysis. *Ker*, 374 U.S. at 36. By contrast, in *Spinelli*, as the government had conceded, probable cause could only be based on the tip itself, albeit corroborated by police. *Spinelli*, 393 U.S. at 415. Thus, where the tip itself was the essential component for establishing probable cause, "a more precise analysis" was required. *Id.*

53. *Spinelli*, 393 U.S. at 413-15. In *Spinelli*, the defendant was convicted of crossing state lines with the intention of conducting gambling activities. *Id.* at 411. On four occasions, the FBI had observed Spinelli drive across state lines and park at a specific apartment house. *Id.* at 413-14. On one occasion, the investigators had observed Spinelli enter a particular apartment. *Id.* at 414. A "reliable" confidential informant had informed the FBI that Spinelli was conducting a bookmaking operation through the use of two specified phone numbers. *Id.* The FBI found that these two numbers were issued to the apartment into which they had observed Spinelli enter. *Id.* The affidavit also stated that Spinelli was known to the affiant and other investigators as a bookmaker and that Spinelli was known to have associated with gamblers. *Id.* This information served as the basis for the issuance of a warrant to search the apartment. *Id.* at 413.

The Court agreed that the affidavit in *Spinelli* was more ample than that presented in *Aguilar*. *Id.* Nevertheless, the Court found the affidavit deficient because it failed to state the informant's basis of knowledge, and because the affiant's conclusory allegation concerning the informant's credibility offered no information to enable the magistrate to make an independent determination. *Id.* at 416.

54. *Id.* at 412. For a discussion of *Aguilar*'s two-pronged test, see note 46 and accompanying text *supra*.

55. 393 U.S. at 415-17.

cient detail.[56]

The *Spinelli* Court stated that a benchmark of a sufficiently detailed tip was the informant's tip in *Draper v. United States*.[57] In *Draper*, the police conducted a warrantless arrest based on information supplied by an informant who had stated that the suspect would arrive in Denver by train from Chicago with heroin in his possession.[58] The informant gave a detailed physical description of the suspect, including the clothing he would be wearing upon his arrival.[59] The *Spinelli* Court noted that when faced with such detail a magistrate could infer that the informant had a reliable basis of knowledge.[60]

The *Spinelli* Court went on to state that the "credibility" or "veracity" prong of *Aguilar*'s two-pronged test could be satisfied where there was independent corroboration of an informant's tip.[61] The relevant inquiry was

56. *Id.* at 417.

57. *Id.* at 416 (citing Draper v. United States, 358 U.S. 307 (1959)).

58. Draper v. United States, 358 U.S. 307, 309 (1959). The arresting officer testified that the informant, one Hereford, had been working for six months as a "special employee" of the Denver Office of the Federal Bureau of Narcotics. *Id.* Further, he stated that Hereford was paid for the information he supplied, and remarked that he had always found Hereford's information to be "accurate and reliable." *Id.* Hereford had informed the officer that Draper was a drug dealer in Denver and that Draper would be arriving by train on one of two specified mornings. *Id.*

59. *Id.* Hereford stated that Draper would be wearing a "light colored raincoat, brown slacks and black shoes." *Id.* at 309 n.2. Hereford also stated that Draper would be carrying "a tan zipper bag" and would be walking "real fast." *Id.* at 309.

60. *Spinelli*, 393 U.S. at 417. As Justice White noted in his concurring opinion in *Spinelli*, such information would be known only by people "who are intimately connected with making careful arrangements for meeting him." *Id.* at 426 (White, J., concurring). Only a person with first-hand knowledge of the narcotics scheme would know exactly what the suspect would be wearing in order to be able to spot him in a crowded train station. *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 179 n.10 (1969). By contrast, the informant in *Spinelli* had only specified that two specific phone numbers were being used for illicit gambling activities. *Spinelli*, 393 U.S. at 417. Such a "meager report" could derive from an offhand remark circulating "at a neighborhood bar," and therefore could not satisfy the basis of knowledge prong. *Id.*

As Justice White pointed out in his *Spinelli* concurrence, *Draper* did not proceed on the basis of the detail provided in the tip. *Spinelli*, 393 U.S. at 427 (White, J., concurring). *See also The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 180 (1969). Rather, Justice White observed, the *Draper* Court had reasoned that because an informant is proven correct on some details he "is more probably right about other facts, usually the critical, unverified facts." *Spinelli*, 393 U.S. at 427 (White, J., concurring). The *Draper* Court had concluded that, since the officer had personally verified almost every detail contained in the informant's tip, there was also probable cause to justify a finding that the unverified information was also true. *Draper*, 358 U.S. at 313-14.

Admittedly, the reasoning in *Draper* is thus inconsistent with *Aguilar* since the *Draper* Court did not specifically inquire into the informant's basis of knowledge. Comment, *supra* note 13, at 964 n.34. Nevertheless, it can be argued that the *Draper* tip satisfied the basis of knowledge prong under *Spinelli* because it "contained self-verifying detail sufficient to infer an adequate basis of knowledge." *Id.*

61. *Spinelli*, 393 U.S. at 415. There is some confusion in the *Spinelli* majority opinion as to whether independent police corroboration could support *Aguilar*'s basis of knowledge prong or whether it could only be used to support the veracity prong.

whether a particular corroborated tip was as trustworthy as a tip capable of passing *Aguilar*'s requirements *without* independent corroboration.[62]

The Supreme Court appeared to stray from a faithful adherence to the *Aguilar* test in *United States v. Harris*.[63] In *Harris*, the plurality appeared to embrace the totality of circumstances approach previously rejected in *Spinelli*.[64] In *Harris*, the Court held that a warrant based on a confidential informant's tip was sufficient to establish probable cause[65] although the affidavit had not set forth facts showing that the informant was credible.[66] The Court, relying on language developed in *Jones*, found a "substantial basis" for establishing probable cause to issue a search warrant.[67]

See Comment, *supra* note 13, at 963 n.30. The *Spinelli* Court stated that the independent corroboration of the "one small detail" in the *Spinelli* tip could not satisfy *both* that the informant was trustworthy and that he obtained his information "in a reliable way." 393 U.S. at 417-18. The opinion thus suggests that independent corroboration of a greater amount of detail in an informant's tip could satisfy both prongs of *Aguilar*. *See* Comment, *supra* note 13, at 963 n.30.

In his concurrence in *Spinelli*, Justice White argued that while the corroboration of detail in a tip which bore no relation to the unverified incriminating facts might support the veracity of the informant, such corroboration did not show that the informant had a reliable basis for his allegations. *Spinelli*, 393 U.S. at 426-27 (White, J., concurring). Justice White hypothesized that if an informant had stated that narcotics were locked in a safe in a specified apartment, proceeded to describe the apartment in detail, and the description of the apartment was verified by independent corroboration, the tip would not be made substantially more believable simply because some detail had been verified. *Id.* at 427 (White, J., concurring). The information about the narcotics could still be based upon information obtained "from circumstances which a magistrate would find unacceptable." *Id.* Most commentators have viewed Justice White's concurrence as the correct reading of the use of independent corroboration of an informant's report. *See* Comment, *supra* note 13, at 963 n.30; Comment, *supra* note 29, at 105. Under this interpretation, independent corroboration of an informant's tip can satisfy *Aguilar*'s veracity prong but not its basis of knowledge prong. *See* Comment, *supra* note 29, at 105.

62. *Spinelli*, 393 U.S. at 415. The Court recognized that after verifying all the details contained in the informant's tip in *Draper*, the police could be assured that the informant "had not been fabricating his report of the whole cloth." *Id.* at 417. In contrast, the Court held that the affidavit in *Spinelli* failed to pass *Aguilar* under the independent corroboration analysis. *Id.* at 418.

63. 403 U.S. 573 (1971).

64. *See* Note, *supra* note 43, at 368.

65. *Harris*, 403 U.S. at 577-85. The informant stated that he had purchased illicit liquor from Harris over a two-year period at a residence Harris had been using. *Id.* at 575. His most recent purchase was within two weeks of the date of the affidavit. *Id.* In reviewing the sufficiency of the affidavit, the Court placed great emphasis on the affiant's knowledge of Harris' reputation. *Id.* Particularly, the Court viewed as substantial the affiant's knowledge of the fact that one constable had located a large amount of illegal whisky at the same residence. *Id.* Other informants also verified that Harris was engaged in the illegal sale of whisky. *Id.*

66. *See id.* at 575. The affidavit stated only that the investigator-affiant had interviewed the informant and had found him to be a "prudent person." *Id.* The Court stated that the lower court's characterization of the word "prudent" as revealing nothing about the credibility of the informant was the type of overly severe scrutiny of an affidavit that had previously been rejected in *Ventresca*. *Id.* at 579 (citing *Ventresca*, 380 U.S. at 102).

67. *Harris*, 403 U.S. at 579-83. The *Harris* Court stated that "*Aguilar* cannot be

Lower court opinions have been inconsistent in their application of the *Aguilar* "two-pronged test."[68] On the one hand, some courts have tended to merge the two prongs.[69] Other courts, however, have scrupulously main-

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read as questioning the 'substantial basis' approach of *Jones*." *Id.* at 581. In *Harris*, there was no question concerning the basis of the informant's knowledge. It was based on his own personal dealings with the suspect in purchasing the liquor. *See id.* at 575-76. For a discussion of the *Harris* affidavit, see notes 65 & 66 *supra*. Although the Court did not speak of the need to pass both requirements of *Aguilar*'s test, most of the Court's opinion was concerned with whether there existed sufficient indicia to support the credibility of the source. *See Harris*, 403 U.S. at 579-80, 583-84. According to the Court, there was a substantial basis for believing the informant because he had been characterized as prudent, and because the affiant knew of the suspect's reputation. *Id.* at 579-80.

Such means for establishing the credibility of the informant would appear inconsistent with the Court's analysis in *Spinelli*. Even accepting the *Harris* Court's premise that the word prudent could be interpreted as meaning reliable, the *Spinelli* Court had rejected the notion that an affiant's characterization of an informant as "reliable" could satisfy *Aguilar*'s veracity prong. *See Spinelli*, 393 U.S. at 416. Such a statement was merely conclusory, allowing the police officer rather than the magistrate to decide whether the informant was credible. *Id.*

Similarly, the use of the affiant's knowledge of the reputation of the suspect as a means of supporting the informant's credibility is inconsistent with language in *Spinelli*, a fact admitted by the *Harris* Court. *Harris*, 403 U.S. at 583. Indeed, a suspect's reputation could be the reason why an informant has falsely implicated a suspect. Rebell, *supra* note 29, at 707 n.29; Note, *supra* note 43, at 365. The two cases may be reconciled on the basis that whereas the *Spinelli* affidavit recited the bare conclusion of the reputation of the affiant, the affidavit in *Harris*, like the affidavit in *Jones*, recited specific events within the affiant's knowledge concerning past activities of the suspect. *See* Rebell, *supra* note 29, at 707 n.29. Thus, the magistrate would be able to draw his own conclusions regarding the suspect's reputation. *See also Brinegar*, 338 U.S. at 160. Reputation of a suspect may have input into the determination of probable cause, "where the circumstances . . . are not such as to indicate the suspect is going about legitimate affairs." *Id.* at 177.

The *Harris* Court also pointed out that since the informant's statement was against his own penal interest, his tip was entitled to greater credibility. *Harris*, 403 U.S. at 583-84. *Harris* does not appear to have abrogated the *Aguilar-Spinelli* framework. *See* Rebell, *supra* note 29, at 707-08. Rather, *Harris* has been interpreted as allowing the credibility prong of *Aguilar* to be satisfied by police corroboration of the suspect's reputation or when the tip itself is made against the informant's penal interest. *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 52, 177 n.31 (1972).

68. *See* Comment, *supra* note 29, at 108-13. Tips from anonymous informants have proven to be particularly troublesome. *See id.* at 113-17.

69. *See, e.g.*, United States v. Sellers, 483 F.2d 37 (5th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974); United States v. Crawford, 462 F.2d 597 (9th Cir.), *cert. denied*, 409 U.S. 915 (1972). In *Sellers*, the informant alleged that Sellers was operating a bookmaking operation from his residence over one of Sellers' two phone numbers. *Sellers*, 483 F.2d at 40 n.1. One phone number which Sellers had repeatedly called belonged to a "known gambler." *Id.* The informant had provided reliable information on more than one hundred occasions. *Id.* The Court upheld a search warrant based on this affidavit. *Id.* at 41. The Court reasoned that where the credibility of an informant is unquestionable, the "quantum of underlying circumstances" necessary to support the informant's basis of knowledge is less. *Id.* In effect, a strong showing in one prong could support, although not displace, circumstances establishing the other prong. *Id.* While the informant's credibility was not at issue in *Sellers*, that part of the tip going towards the basis of the informant's knowledge in *Sellers* is strikingly similar to the tip in *Spinelli*. *See Spinelli*, 393 U.S. at 413-14. The tip in *Spinelli* was

tained that the two prongs must be kept separate and independent.[70]

Similarly, the lower courts have been split on how the *Aguilar* test may be satisfied. While some courts have argued that independent corroboration of an informant's tip can satisfy both prongs of *Aguilar*, other courts have adhered to the view that independent corroboration can only support the veracity prong.[71] There has also been some disagreement over whether the corroboration need be of incriminating behavior, or whether corroboration of seemingly innocent activity is sufficient.[72] Finally, courts have differed in

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held to be insufficient to establish the basis of knowledge prong. *Id.* at 416. For a discussion of this aspect of *Spinelli*, see note 60 *supra*.

In *Crawford*, the Ninth Circuit was willing to go even further than the Fifth Circuit had gone in *Sellers*. In effect, the court allowed one prong to *replace* the other. *See Crawford*, 462 F.2d at 599. In *Crawford*, the affiant had acquired information from a confidential informant. *Id.* at 598 n.1. The informant recounted an elaborate transportation route which he alleged Crawford had told him was used to smuggle hashish into the United States. *Id.* The informant stated that Crawford had approached him with an offer to smuggle drugs into this country. *Id.* at 598-99 n.1. Furthermore, Crawford had shown him where he had hidden the contraband. *Id.* at 599 n.1. Although there was nothing in the affidavit concerning the informant's credibility, the court declined to view the two prongs of *Aguilar* as being entirely independent of each other. *Id.* at 599. Rather, sufficiency of one prong could "furnish support for the other." *Id.* The Ninth Circuit concluded that the detailed statement of facts by the informant supported the credibility of the informant and the reliability of his information. *Id.*

70. *See, e.g.*, People v. Gates, 82 Ill. App. 3d 749, 755, 403 N.E.2d 77, 81 (1980) (where the basis of knowledge prong is not satisfied, there is no need to inquire into the veracity prong); Stanley v. State, 19 Md. App. 507, 313 A.2d 847 (1974). In *Stanley*, the petitioner was convicted of possession of heroin. 19 Md. App. at 509, 313 A.2d at 847. The heroin was discovered during a warrantless search of petitioner's automobile predicated upon a confidential informant's tip. *Id.* at 509-13, 313 A.2d at 849-51. The informant previously had given information that, on two separate occasions, led to arrests and confiscation of substantial quantities of marijuana. *Id.* at 512, 313 A.2d at 851. Although the tip satisfied *Aguilar*'s veracity prong with "flying colors," the *Stanley* court concluded that a separate analysis of the basis of knowledge prong was required as the " 'basis of knowledge' test is not concerned one whit with an informant's . . . veracity." *Id.* at 530, 313 A.2d at 861. For an extensive discussion of the views of Justice Moylan, the author of the *Stanley* opinion, on the *Aguilar* two-pronged test, see Moylan, *supra* note 43.

71. *Compare* United States v. Bush, 647 F.2d 357, 363, 365 (3d Cir. 1981) (corroboration of detail in an informant's tip may support the veracity prong of *Aguilar*, but "is not probative" with respect to the basis of knowledge prong) *with* United States v. Fluker, 543 F.2d 709, 713-14 (9th Cir. 1976) (corroboration of informant's tip may buttress either the veracity or basis of knowledge prong) *and* United States v. Larkin, 510 F.2d 13, 15 (9th Cir. 1974) (corroboration of informant's tip may be used to support both prongs of *Aguilar*). For a discussion of the confusion in *Spinelli* over this issue, see note 61 *supra*.

72. Lower courts have generally held that the corroboration must be of suspicious rather than innocent activity in order to have input into the probable cause equation. *See, e.g.*, United States v. Rasor, 599 F.2d 1330, 1332 (5th Cir. 1979); United States v. Jordon, 530 F.2d 722, 726 (6th Cir. 1976); United States v. Larkin, 510 F.2d 13, 15 (9th Cir. 1974). The rationale for the requirement that the corroboration be of suspicious activity lies in the belief that corroboration of merely "innocent" activity does not negate the possibility that an informant has "allege[d] *some* true innocent facts to make his story appear credible." Comment, *supra* note 13, at

the amount of flexibility they have allowed within the *Aguilar* standard.[73]

Against this background, the Supreme Court,[74] in *Illinois v. Gates*, addressed the issue of whether a partially corroborated anonymous informant's tip could supply the basis for establishing probable cause for the issuance of a search warrant.[75] At the outset, the majority decided that it was improvident for the Court to address a possible modification of the exclusionary rule.[76] Rather, Justice Rehnquist, writing for the majority, focused on the

967 (footnote omitted) (emphasis in original). *See also* Note, *supra* note 43, at 362-63. *But see* United States v. Manning, 448 F.2d 992, 998-99 (2d Cir.) (en banc) (corroboration of innocent details may be used to support finding of probable cause), *cert. denied*, 404 U.S. 995 (1971). The argument that corroboration of innocent activity cannot support *Aguilar*'s veracity prong overlooks the fact that, "[b]ecause the question addressed is one of probable cause, the issue is not whether the information given by an informer may possibly be false. Rather, it is whether such information is more probably true than false. Generally . . . one does not want to court disaster by fooling the police." Livermore, *The* Draper-Spinelli *Problem*, 21 ARIZ. L. REV. 945, 952 (1979). Since probable cause does not require certainties, nor a prima facie showing of guilt, it does not require that all possibilities of risk that an informant is lying be eliminated. *See Brinegar*, 338 U.S. at 175 ("[i]n dealing with probable cause . . . we deal with probabilities").

73. *Compare* United States v. McNally, 473 F.2d 934 (3d Cir. 1973) *with* Bridger v. State, 503 S.W.2d 801 (Tex. Crim. App. 1974). In *McNally*, the court observed that an unduly "formal or unrealistic" scrutiny of an affidavit "upsets the equilibrium achieved in the Fourth Amendment." 473 F.2d at 943. Therefore, the court adopted a flexible approach allowing for the consideration of not only the informant's tip but all the other circumstances set forth in the affidavit, including the suspect's prior criminal record. *Id.* at 939-40. In *Bridger*, the court also professed to adhere to a flexible rather than an overly technical approach. *Bridger*, 503 S.W.2d at 803. In *Bridger*, a search warrant obtained for Bridger's residence was based upon information from a named informant who was an accomplice of Bridger's in a robbery. *Id.* The informant, who had given the affiant $800 which was taken in the robbery, stated that Bridger had in his apartment a .38 caliber revolver and two ski masks that were used in the robbery. *Id.* Nevertheless, the court held that the warrant was invalid because the affidavit could not pass *Aguilar*'s basis of knowledge prong. *Id.* According to the court, the affidavit did not present any of "the underlying circumstances from which the informant concluded that the named implements . . . were where he claimed they were." *Id.* The *Bridger* court's interpretation of *Aguilar* thus appeared to be an overly-technical one, contrary to the court's own language.

74. Justice Rehnquist wrote the opinion of the Court in which Chief Justice Burger and Justices Blackmun, Powell and O'Connor joined. Justice White concurred in the judgment in a separate opinion. Justice Brennan filed a dissenting opinion in which Justice Marshall joined. Justice Stevens filed a separate dissenting opinion in which Justice Brennan joined.

75. 103 S. Ct. at 2321.

76. *Id.* at 2325. The Supreme Court declined to address the issue of a possible good faith exception to the exclusionary rule because the issue was not "pressed or passed upon" in the lower courts. *Id.* at 2321-22. The Court viewed the exclusionary rule issue and the probable cause issue as sufficiently "separate claim[s] that [they] had to be specifically presented to the state courts." *Id.* at 2324. The Court stated that regardless of whether the "not pressed or passed upon" rule was regarded as jurisdictional or merely discretionary, the Court should decline to hear the issue. *Id.* at 2323. The Court observed that since the issue had not been contested below, the record was devoid of the facts, such as the subjective good faith of police, necessary to decide the issue. *Id.* The Court also believed that hearing an issue not presented

fourth amendment issue, emphasizing that the concept of probable cause was a flexible, "fluid" standard.[77] The Court regarded the rigid two-pronged test that evolved from *Aguilar* as inconsistent with this standard.[78] The Court reasoned that a "totality of circumstances" approach was more in line with traditional notions of probable cause; that is, probable cause is a practical, nontechnical conception, and not a science.[79] In contrast, the Court stated that the two-pronged test had invited "technical dissection of informants' tips."[80] The *Aguilar* test forced reviewing courts to overemphasize two specific issues which, in the *Gates* Court's view, could not logically be separated from other facts presented in the affidavit.[81]

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below in state court would encroach upon the proper relationship between federal and state courts. *Id.* In the Court's view, the state court should have an opportunity to address the issue. *Id.* The state court, even though it may agree with the prosecution as a matter of federal law, might decide the case on independent state grounds. *Id.* That possibility was especially strong here, according to the Court, since Illinois had adopted its own exclusionary rule even before the Supreme Court had made the exclusionary rule applicable to the states under the federal Constitution. *Id.* Furthermore, as the issue of a proposed good faith exception to the exclusionary rule was an issue of "unusual significance," the Court noted that there were especially "strong reasons to adhere scrupulously to the customary limitations on our discretion." *Id.* at 2324-25. Therefore, the issue would be "reserve[d] for another day." *Id.* at 2325. For a discussion of the procedural context in which the exclusionary issue arose, see note 12 *supra*. For a discussion of the exclusionary rule, see notes 17-19 and accompanying text *supra*. For a discussion of Justice White's analysis in *Gates* on the issue of whether there should be a good faith exception to the exclusionary rule, see note 104 and accompanying text *infra*.

77. 103 S. Ct. at 2328. The Court observed that the term probable cause " 'imports a seizure made under circumstances which warrant suspicion.' " *Id.* at 2330 (quoting Locke v. United States, 11 U.S. (7 Cranch) 339, 348 (1813)). The Court reiterated that the term probable cause by definition deals with probabilities, not certainties. *Id.* at 2328 (citing United States v. Cortez, 449 U.S. 411, 418 (1981)). In determining these probabilities, one must weigh the evidence from the viewpoint of a law enforcement official, not an academician. *Id.*

78. *Id.* at 2328, 2332. The Court emphasized that the determination of probable cause is a fact-sensitive inquiry. *Id.* As such, it is "not . . . usefully reduced to a neat set of legal rules." *Id.* The Court also emphasized that *Aguilar*, as explicated by *Spinelli*, had been criticized by some members of the Court itself. *Id.* at 2332 n.11.

79. *Id.* at 2328 (citing *Brinegar*, 338 U.S. at 176). The Court found that the totality of circumstances approach had "informed probable cause determinations" in some of its earlier cases. *Id.* at 2332 (citing *Ventresca*, 380 U.S. at 102; *Jones*, 362 U.S. at 257; *Brinegar*, 338 U.S. at 160). For a discussion of *Brinegar*'s articulation of the probable cause standard, see note 24 and accompanying text *supra*.

80. 103 S. Ct. at 2330. The Court noted that such hypertechnical scrutiny of an affidavit was expressly rejected in *Ventresca*. *Id.* (citing *Ventresca*, 380 U.S. at 108). For a discussion of *Ventresca*, see notes 47-50 and accompanying text *supra*.

81. 103 S. Ct. at 2330-31. The Court stated that some lower courts had allowed the two-pronged test to assume an "entirely independent character" from the inquiry into probable cause. *Id.* at 2328 n.5 (citing People v. Gates, 85 Ill. 2d 376, 423 N.E.2d 837 (1981); Stanley v. State, 19 Md. App. 507, 313 A.2d 847 (1974)). The Court summarized the "elaborate set of legal rules" that lower courts have developed as ancillary to the two-pronged test. 103 S. Ct. at 2327 & n.4. The Court observed that lower courts, including the Illinois court in *Gates*, had treated each prong as entirely independent requirements. *Id.* The Court noted that under the Illinois Supreme Court's approach, a particularly detailed tip may satisfy the basis of knowl-

The Court agreed that *Aguilar*'s basis of knowledge and veracity requirements were "highly relevant" considerations in the probable cause analysis.[82] Yet, the Court cautioned that these factors should not be considered as independent requirements to be exacted in every instance.[83] Rather, under a totality of circumstances approach, in order to establish probable cause, a strong showing in one prong could compensate for a deficiency in the other.[84]

Recognizing that affidavits are normally written by laymen and often reviewed by non-lawyers as well, the Court viewed a common-sense test for probable cause as superior to any extreme judicial refinement of the requirements for probable cause.[85] Furthermore, the majority asserted that strict after-the-fact scrutiny of the affidavit not only negatives the Court's traditional deference to the magistrate's independent judgment,[86] it also deters law enforcement officers from seeking warrants.[87]

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edge requirement, but not the veracity prong. *Id.* On the other hand, corroboration of an informant's tip could satisfy the veracity prong only, and not the basis of knowledge prong. *Id.* For a discussion of the lower courts' application of the *Aguilar* prongs to informants' tips, see notes 68-73 and accompanying text *supra*.

82. 103 S. Ct. at 2327. According to the Court, the two issues should be considered as "intertwined" factors which serve as useful tools in the common-sense inquiry into probable cause. *Id.*

83. *Id.* at 2327-28. The Court suggested that the *Aguilar* test was not originally intended to be an inflexible rigid test. *Id.* at 2328 n.6. Rather, it was intended to serve as a guideline for magistrates. *Id.*

84. *Id.* at 2329 (citing Adams v. Williams, 407 U.S. 143 (1972); *Harris*, 403 U.S. at 573). The Court explored several hypotheticals which could establish probable cause under its new approach. *Id.* For instance, if an informant has accurately predicted certain types of criminal conduct in a particular locality, the fact that he has given no basis of knowledge for his tip should not *per se* defeat his tip as establishing probable cause. *Id.* Further, if an informant's credibility is called into question, his detailed information, including a statement that he personally observed the facts he alleges, "entitles his tip to greater weight than might otherwise be the case." *Id.* at 2329-30. Finally, if an informant is unquestionably honest, there need not be rigorous inquiry into his basis of knowledge. *Id.* at 2329 (citing *Williams*, 407 U.S. at 146-47).

85. *Id.* at 2330-31. The Court emphasized that the issuing of a warrant is an informal legal proceeding and thus does not require the specificity of "common law pleading." *Id.* (citing *Ventresca*, 380 U.S. at 108). The Court stated that "the 'built-in subleties,' . . . of the 'two-pronged test' are particularly unlikely to assist magistrates in determining probable cause." *Id.* at 2331 (citing Stanley v. State, 19 Md. App. 507, 313 A.2d 847 (1974)). Therefore, the Court concluded that the rigid, formalistic test that has evolved from *Aguilar-Spinelli* would be of little practical value to issuing magistrates. *Id.*

86. *Id.* at 2331. For a discussion of the Court's traditional deference to a magistrate's determination of probable cause, see note 45 *supra*.

87. 103 S. Ct. at 2331. The Court stated that a grudging approach by reviewing courts towards the sufficiency of an affidavit might result in police resorting to warrantless searches. *Id.* If warrants were invalidated on technicalities, police might conduct searches "with the hope of relying on consent or some other exception to the warrant clause that might develop at the time of the search." *Id.* According to the Court, obtaining a warrant was more desirable than conducting a warrantless search or arrest. *Id.* at 2331 & n.10. The presence of a warrant reduced the intrusiveness of the search or arrest. *Id.* It assured the individual who was the subject of the search

In rejecting a rigid application of the *Aguilar* test, Justice Rehnquist reasoned that such an inflexible approach would greatly impede what he viewed as the most important function of government—the protection of its citizens.[88] Emphasizing the importance of anonymous tips to effective law enforcement,[89] the Court stated that such tips would seldom be available to police if the *Aguilar* requirements were strictly applied.[90]

In adopting a standard for judicial review of magistrate determinations of probable cause, the Court returned to the "substantial basis" language set forth in *Jones*.[91] Therefore, if a reviewing court can find a substantial basis for the magistrate's determination that probable cause existed to issue a warrant, then the fruits of a search or arrest pursuant to such a warrant are admissible against the defendant.[92] However, the Court reiterated the limits beyond which a magistrate may not venture in issuing a warrant.[93] The Court reaffirmed its prior holdings which recognized that a "bare-bones" affidavit, stating merely the conclusion of the affiant[94] or informant,[95] without more, was insufficient to establish probable cause.[96]

In applying the totality of circumstances approach to the facts of *Gates*, the Court recognized that the anonymous tip, standing alone, could not es-

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or seizure " 'of the lawful authority of the executing officer.' " *Id.* at 2331 (quoting United States v. Chadwick, 433 U.S. 1, 9 (1977)). Thus, to ensure that a warrant would remain the norm for police searches and arrests, the Court concluded that a less rigorous inquiry should apply than that which has derived from the *Aguilar* test. *Id.* at 2331 n.10.

88. *Id.* at 2331. The Court noted that "fidelity" to the constitution demanded the proper balance between protection of society as a whole and respect for individual rights. *Id.* at 2333-34. Thus, in the Court's view a judge who upholds the constitutional rights of an individual in every "bizarre" case is no more faithful to the mandate of the constitution than a judge who supports every one of the government's intrusions into individual liberties on the justification of protecting society. *Id.* at 2333.

89. *Id.* at 2331-32. The Court noted that anonymous tips often lead to the solving of otherwise "perfect crimes." *Id.* at 2332. For a discussion of the use of anonymous tips in law enforcement, see note 29 *supra*.

90. 103 S. Ct. at 2331. The Court noted that since the credibility of anonymous informants is unknown by definition, an anonymous informant's tip would rarely survive either of *Aguilar's* prongs. *Id.* at 2331-32.

91. *Id.* at 2332 ("this flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires"). For a discussion of the substantial basis approach of the Court in *Jones*, see notes 31-35 and accompanying text *supra*.

92. 103 S. Ct. at 2332.

93. *See id.*

94. *Id.* (citing *Nathanson*, 290 U.S. at 41). For a discussion of *Nathanson*, see notes 25-27 and accompanying text *supra*.

95. 103 S. Ct. at 2332 (citing *Aguilar*, 378 U.S. at 108). For a discussion of *Aguilar*, see notes 42-46 and accompanying text *supra*.

96. 103 S. Ct. at 2332. The Court stated, however, when the affidavit is more ample than the conclusory affidavits in *Nathanson* or *Aguilar*, the question of the sufficiency of the affidavit "simply does not lend itself to a prescribed set of rules." *Id.* at 2333.

tablish probable cause.[97] The Court observed the importance of police corroboration of an informant's tip as a means of establishing probable cause.[98] Despite the fact that the tip was provided by an anonymous source,[99] the Supreme Court found the showing of probable cause in *Gates* to be equally compelling to that demonstrated in *Draper*.[100] In fact, Justice Rehnquist concluded that the independent police and DEA investigation in *Gates* was itself suggestive of illegal activities on the part of the defendants.[101] Remarking that the anonymous letter might not have satisfied a strict construction of either prong of the *Aguilar* test,[102] the Court nevertheless stated that, when accompanied by the corroborative work of the various law enforcement personnel, the *Gates* affidavit provided a substantial basis for the judge

97. *Id.* at 2326. According to Justice Rehnquist, the anonymous letter did not provide a basis for concluding that the informant was honest or his information reliable, nor did it provide a means of ascertaining the basis of the author's knowledge. *Id.* Hence, the letter, standing alone, would not have successfully overcome either prong of the *Aguilar* test. *See id.*

98. *Id.* at 2334 (citing *Jones*, 362 U.S. at 257; *Draper*, 358 U.S. at 307). For a discussion of corroboration of the *Jones* tip, see note 34 and accompanying text *supra*. For a discussion of corroboration of the tip in *Draper*, see note 62 *supra*.

99. For a discussion of credibility concerns inherent in an anonymous tip, see note 29 *supra*.

100. 103 S. Ct. at 2334. The Court characterized *Draper* as "the classic case" on the value of independent corroboration of an informant's tip in the probable cause analysis. *Id.* The Illinois Supreme Court had distinguished *Draper* on the basis that, unlike *Gates*, *Draper* involved an informant who had given reliable reports on previous occasions, while the informant in *Gates* was anonymous. *Id.* at 2335. The *Gates* Court concluded that this distinction became "far less significant" after independent police corroboration. *Id.* The Court concluded that the informant, through police corroboration, was proven correct on some details, and " '[b]ecause an informant is right about some things, he is more probably right about other facts.' " *Id.* at 2335 (quoting *Spinelli*, 393 U.S. at 427 (White, J., concurring)). The Court noted that the Illinois Supreme Court had reasoned that since the corroboration of the anonymous tip pertained only to *innocent* activity, it could not establish probable cause. *Id.* at 2335 n.13. The Supreme Court poined out, however, that the detail corroborated in *Draper* was also of seemingly innocent activity. *Id.* Furthermore, in both *Gates* and *Draper* "seemingly innocent activity became suspicious in light of the initial tip." *Id.* (quoting People v. Gates, 85 Ill. 2d 376, 396, 423 N.E.2d 887, 896 (Moran, J., dissenting)). However, the Court believed that in the final analysis, the issue was not whether the activity corroborated was "innocent" or "guilty." *Id.* at 2335 n.13. Rather, the relevant inquiry should be directed towards "the degree of suspicion that attaches to particular types of non-criminal acts." *Id.* The Court reasoned that, as probable cause is not concerned with a prima facie case of guilt, by definition, seemingly innocent activity might well form the basis for probable cause. *Id.* For a discussion of the corroboration of innocent detail in an informant's tip as a means of establishing probable cause, see note 72 and accompanying text *supra*.

101. 103 S. Ct. at 2334 (citing United States v. Mendenhall, 446 U.S. 544, 562 (1980) (Powell, J., concurring)). The Court took judicial notice of the fact that Florida is a notorious source of narcotics. *Id.* at 2334. In the Court's view, the somewhat unusual travelling plans of the Gates were "as suggestive" of illicit drug trafficking "as . . . of an ordinary vacation trip." *Id.*

102. *Id.* at 2335-36. The Court conceded that the corroboration of the informant's tip may not have satisfied *Aguilar's* veracity prong. *Id.* at 2335. It was sufficient, however, in the Court's view that the corroboration " ' reduced the chances of a reckless or prevaricating tale. . . .' " *Id.* (quoting *Jones*, 362 U.S. at 271). For a

issuing the warrant to find probable cause.[103]

Justice White, concurring in the result of the majority, would have decided the case on a good faith exception to the exclusionary rule.[104] How-

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discussion of the Court's analysis of the corroboration of the tip, see notes 98-100 and accompanying text *supra*.

The Court also recognized that the detail set forth in the tip may have been insufficient to satisfy *Aguilar's* basis of knowledge test under a rigorous application of that prong. 103 S. Ct. at 2335-36. For a discussion of the Court's analysis of the detail in the informant's tip, see note 103 *infra*. The *Gates* Court questioned whether *Draper* itself could have survived the rigorous inquiry that has developed from the *Aguilar* prongs. 103 S. Ct. at 2334 n.12.

103. 103 S. Ct. at 2336. The Court noted that the details in the *Gates* tip were details concerning "future actions of third parties ordinarily not easily predicted." *Id.* at 2335. Thus, a magistrate could reasonably infer that the anonymous informant derived his information from the Gates themselves or someone who was in their trust. *Id.* Corroboration of the parts of the tip "provide[d] just this probability." *Id.* at 2336. The majority conceded that the informant could have learned of the Gates' travel plans from a "talkative neighbor or travel agent." *Id.* The Court reasoned, however, that since probable cause is not concerned with certainties, it was not necessary for the magistrate to be able to eliminate all other possibilities. *Id.*

The Court also observed the error in the informant's prediction—that Sue Gates would fly home, when she instead drove back to Illinois with her husband. *Id.* at 2335 n.14. The Court stated that it had never required informants to be infallible nor did probable cause require such perfection. *Id.* The Court argued that contrary to Justice Stevens' view in his dissent, this error was not a "material mistake" which undermined the magistrate's issuance of a warrant to search the Gates' home. *Id.* at 2336 n.14. Indeed, in the Court's view, Justice Stevens' scrutiny of the informant's tip was the exact type of "line-by-line" dissection of an affidavit by a reviewing court that the Court found inappropriate. *Id.* at 2335-36 n.14. For a discussion of Justice Stevens' view of the mistake in the informant's letter, see notes 119-20 and accompanying text *infra*.

104. 103 S. Ct. at 2336 (White, J., concurring). Justice White believed that the issue concerning modification of the exclusionary rule was properly before the Court. *Id.* Justice White did not share the majority's view that the questions of whether there was a violation of the fourth amendment, and if so, whether the exclusionary rule warranted suppression of the evidence, were two distinct issues. *Id.* at 2337 (White, J., concurring). Rather, Justice White viewed the question of the scope of the exclusionary rule as inseparable from the fourth amendment violation itself. *Id.* at 2337-38 (White, J., concurring). According to Justice White, "the degree of probable cause, the presence of a warrant, and the clarity of previously announced fourth amendment principles all inform the good faith issue." *Id.* at 2338 (White, J., concurring). Thus, a proposed modification of the exclusionary rule was just another argument proffered by the state for admitting the evidence. *Id.* at 2337 (White, J., concurring). As such, it fell within the Supreme Court's jurisdiction. *Id.* (citing Dewey v. Des Moines, 173 U.S. 193 (1898)). Justice White found the majority's prudential concerns for not hearing the exclusionary rule issue equally unpersuasive. *Id.* at 2338-40 (White, J., concurring).

In analyzing the exclusionary rule issue, Justice White noted that the exclusionary rule is not a constitutional right of the defendant, but rather a judicial remedy for fourth amendment violations. *Id.* at 2340 (White, J., concurring). Because the exclusionary rule exacts a heavy toll on society by excluding probative evidence, it is necessary to confine its impact to those situations in which its purpose of deterrence is "most efficaciously observed." *Id.* (citing United States v. Calandra, 414 U.S. 338 (1974)). Justice White stated that an indiscriminate application of the exclusionary rule, without regard to the nature of government official's violations, was undesirable for several reasons. *See id.* at 2342 (White, J., concurring). First, indiscriminate ap-

ever, briefly addressing the constitutionality of the search and seizure in *Gates*, he concluded that the warrant was validly issued under the *Aguilar-Spinelli* framework.[105] In Justice White's view, the police corroboration was sufficient to satisfy both prongs of the *Aguilar-Spinelli* test.[106] Because Justice

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plication of the rule might generate rather than deter disrespect for the law. *Id.* Justice White argued that the windfall afforded the defendant "is contrary to the idea of proportionality that is essential to the concept of justice." *Id.* at 2342-43 (White, J., concurring). It leads law enforcement officials to conclude that "the courts cannot be satisfied, that the rules are hopelessly complicated and subject to change, and that the suppression of evidence is the court's problem and not the [police] departments'." *Id.* at 2344 n.15 (White, J., concurring) (quoting Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1050 (1974)). Second, when an officer has acted on the reasonable belief that he is acting within the bounds of the law, the only deterrent effect the exclusionary rule could have is to deter the officer from performing his duty. *Id.* at 2342 (White, J., concurring).

Justice White noted the exclusionary rule's particularly important influence in the area of narcotics prosecutions. *Id.* at 2342 n.13 (White, J., concurring). One California study revealed that 30% of all felony drug prosecutions were dropped because of search and seizure problems. *Id.* (citing NATIONAL INSTITUTE OF JUSTICE, THE EFFECTS OF THE EXCLUSIONARY RULE: A STUDY IN CALIFORNIA (1982)).

In balancing the deterrent effect on police misconduct with the cost to society by the exclusion of probative evidence, Justice White concluded that the balance "clearly favor[ed]" modification of the exclusionary rule, so as to allow a good faith exception. *Id.* at 2344 (White, J., concurring). The standard for the exception Justice White espoused would be an objective one, rather than an inquiry into the subjective good faith belief of the officer. *Id.* at 2347 (White, J., concurring). Thus, the good faith exception would not apply when an officer *should have known* the search or arrest was unlawful, or the circumstances were " 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' " *Id.* at 2344 (White, J., concurring) (quoting Brown v. Illinois, 422 U.S. 590, 610-11 (1975) (Powell, J., concurring)). *See also id.* at 2344 n.15 (White, J., concurring).

Justice White noted that the strongest case for a good faith exception was when police had obtained a warrant. *Id.* at 2344-45 (White, J., concurring). The warrant serves as *prima facie* evidence that the police acted reasonably. *Id.* at 2345 (White, J., concurring).

105. *Id.* at 2347-50 (White, J., concurring). Justice White agreed with the majority that the tip by itself was insufficient to establish probable cause. *Id.* at 2348 (White, J., concurring). Justice White also agreed that the unusual itinerary of the Gates suggested involvement in drug activity. *Id.* Justice White concluded, however, that whether the activity was regarded as innocent or not was not conclusive of the question of whether the tip passed the *Aguilar-Spinelli* prongs. *Id.* Instead, the proper inquiry was "whether the actions of the suspects, whatever their nature, give rise to an inference that the informant is credible and that he obtained his information in a reliable manner." *Id.* Justice White was also in agreement with the majority that an informant's information need not be infallible. *Id.* at 2349 n.23 (White, J., concurring).

106. *Id.* at 2349 (White, J., concurring). Justice White mentioned that Justice Brennan's dissent erroneously interpreted Justice White's concurrence in *Spinelli*. *Id.* at 2349 n.22 (White, J., concurring) (citing *Spinelli*, 393 U.S. at 423 (White, J., concurring)). Justice White stated that in his *Spinelli* concurrence he did not intend to intimate that independent police corroboration would never provide the means to satisfy the basis of knowledge prong. *Id.* Rather, Justice White stated that he was concerned that a court might allow corroboration of the tip to satisfy the basis of knowledge prong when in fact the information corroborated did not indicate anything regarding the informant's basis of knowledge. *Id.* Justice White believed that if police corroboration is of information "from which it can be inferred that the in-

White perceived the Court's ruling as possibly foretelling "an evisceration of the probable cause standard," he did not believe that the *Aguilar-Spinelli* two-pronged test should be overruled.[107] Rather, he would have attempted to clarify *Aguilar-Spinelli* by offering more precise guidelines.[108]

In his dissenting opinion,[109] Justice Brennan emphasized the judiciary's function as the only effective means of protecting fourth amendment

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formant's tip was grounded on inside information," then the tip as corroborated can satisfy the basis of knowledge prong. *Id.* Relying on *Draper*, Justice White observed that the majority in *Spinelli* had emphasized that corroboration of an informant's tip could furnish grounds to support *both* prongs of *Aguilar*. *Id.* Justice White reasoned that after police corroboration of the informant's prediction, a magistrate could reasonably infer that the informant had not fabricated a story. *Id.* at 2349 & n.22 (White, J., concurring). Similarly, it could also be reasonably inferred from corroboration of the details concerning the unusual travel plans of the Gates that the informant had a reliable basis of knowledge. *Id.* Justice White explained that it appeared that the *Draper* Court itself did not adopt this reasoning in its analysis. *Id.* at 2349 n.22 (White, J., concurring). Rather, the Court in *Draper* had reasoned that because an informant was proven correct on nine facts, he was probably correct about the tenth fact. *Id.* (citing *Spinelli*, 393 U.S. at 426-29 (White, J., concurring)). Justice White noted, however, that this interpretation of *Draper* had been rejected by the Court in *Spinelli*. *Id.* at 2349 n.22 (White, J., concurring). Justice White conceded that the fact that the affidavit reported the Gates headed on a northbound interstate highway, was not conclusive that the Gates were returning directly to Illinois. *Id.* at 2349 n.24. (White, J., concurring). Furthermore, it was not outside the realm of possibility that the author of the anonymous letter was a " 'vindictive travel agent.' " *Id.* at 2349 (White, J., concurring). Justice White believed, however, that all other possibilities need not be eliminated when one is dealing merely with probabilities and not prima facie guilt. *Id.* (citing *Spinelli*, 393 U.S. at 419).

107. 103 S. Ct. at 2350 (White, J., concurring). Justice White argued that the majority's proposal that an affidavit which fails to set forth the basis of the informant's knowledge may be compensated by a showing that the informant is credible, would mean that a police officer-affiant's conclusion that contraban would be in a particular place could thus constitute probable cause. *Id.* For "[i]t would be 'quixotic,' " in Justice White's words "if a similar statement from an honest informant, but not one from an honest officer, could furnish probable cause." *Id.* Justice White noted, however, that the Court had previously rejected the conclusory affidavit of a police officer as a basis for establishing probable cause. *Id.* (citing *Nathanson*, 290 U.S. at 41). Therefore, Justice White saw this statement of the Court as "rejecting the teachings" of the Court's prior cases. *Id.*

At the same time, Justice White pointed out that this drastic result may not have been intended by the Court, particularly because the Court had expressly approved of the *Nathanson* holding. *Id.* Justice White viewed the majority opinion as leaving any tip more ample than a mere conclusory statement to the common-sense discretion of magistrates. *Id.*

108. *Id.* at 2350-51 (White, J., concurring). Justice White agreed with the majority that some lower courts had applied an excessively technical approach to the *Aguilar* prongs. *Id.* at 2350 (White, J., concurring). However, because the determination of probable cause in the context of an informant's tip presented a difficult decision, Justice White perceived a need to offer magistrates more guidance than the majority's common-sense approach offered. *Id.* at 2350-51 (White, J., concurring). Such guidance, in Justice White's view, would include clarification of the use of corroborative information in the *Aguilar* context, as well as clarifying the relation between *Aguilar* and *Draper*. *Id.*

109. *Id.* at 2351 (Brennan, J., dissenting). Justice Marshall joined in Justice Brennan's dissent.

rights.[110] In recognition of the judiciary's important role in this area, Justice Brennan stressed the requirement that probable cause be determined by a neutral and detached magistrate.[111] According to Justice Brennan, a structured analysis, such as that provided by the two prongs of *Aguilar*, could ensure that the magistrate perform this function,[112] as opposed to serving merely as a rubber stamp for a police officer's conclusions.[113] Justice Brennan reasoned that although the two-pronged test provided some guidance, it was not an unduly rigid standard.[114] He concluded that the majority had discarded this standard[115] for the "code words," "practical, nontechnical,

110. *Id.* Justice Brennan reiterated Justice Jackson's warning that "[s]ince the officers are themselves the chief invaders, there is no enforcement outside of court." *Id.* (citing *Brinegar*, 338 U.S. at 181 (Jackson, J., dissenting)).

111. *Id.* For a discussion of the requirement of a neutral and detached magistrate in the context of the fourth amendment, see note 15 and accompanying text *supra*.

112. 103 S. Ct. at 2355 (Brennan, J., dissenting). Justice Brennan was unconvinced that the majority's recognition of police officers and many magistrates as nonlawyers required the abrogation of any formal test. *Id.* at 2358 (Brennan, J., dissenting). Indeed, in Justice Brennan's view, this fact was all the more reason to provide law enforcement officials and magistrates with more specific guidelines. *Id.* Justice Brennan argued that the *Aguilar* standard provided just this function, as it informed law enforcement officials of the type of information to include in the affidavit and informed magistrates of the information they should require. *Id.*

113. *Id.* at 2358 (Brennan, J., dissenting). Quoting *Aguilar*, Justice Brennan observed that the concerns over "rubber stamping" are equally great in situations where the information has been supplied by an unidentified informant. *Id.* at 2353 (Brennan, J., dissenting) (quoting *Aguilar*, 378 U.S. at 115). In fact, Justice Brennan noted that an anonymous tip presented even more of an occasion to apply the *Aguilar* prongs. *Id.* at 2356 (Brennan, J., dissenting). As Justice Brennan pointed out, by definition an anonymous informant's credibility was unknown and as such an informant should perhaps be treated as "presumptively unreliable." *Id.* (citing Comment, *supra* note 29, at 107). For a discussion of possible motives of an anonymous informant, see note 29 *supra*.

114. 103 S. Ct. at 2357-58 (Brennan, J., dissenting). Justice Brennan argued that the two-pronged test was flexible enough that there would still be plenty of room for magistrates to exercise their common-sense once it could be reasonably inferred that the information derived from a credible person who had obtained his information in a reliable way. *Id.* Contrary to the majority view, Justice Brennan stated that the two-pronged test was not so inflexible as to preclude the use of informants' tips as a basis for finding probable cause. *Id.* In Justice Brennan's view, the fact that some lower courts *may* have applied an overly technical approach to the standard did not justify its abrogation. *Id.* at 2358 (Brennan, J., dissenting).

115. *Id.* at 2359 (Brennan, J., dissenting). In discarding the *Aguilar* test, Justice Brennan argued that the majority had placed reliance on earlier cases which were in no way inconsistent with *Aguilar*. *Id.* at 2357 (Brennan, J., dissenting). He argued that in each of the three pre-*Aguilar* cases relied upon by the majority, the informant's tip was sufficient to establish probable cause under the *Aguilar* prongs. *Id.* (citing *Rugendorf*, 376 U.S. 528; *Ker*, 374 U.S. 23; *Jones*, 362 U.S. 257). Furthermore, he argued that the common-sense approach articulated by the Court in *Ventresca* was to be used in assessing compliance with the *Aguilar* prongs. *See id.* at 2358 (Brennan, J., dissenting) (citing *Ventresca*, 380 U.S. at 102). *Jaben* was reconcilable with *Aguilar* because of the *Jaben* Court's emphasis on the peculiarities of the nature of the offense involved in that case, tax evasion. *Id.* at 2357 n.7 (Brennan, J., dissenting) (citing

and commonsense,"[116] which signified an excessively "permissive attitude towards police practices in derogation" of fourth amendment rights.[117] Even accepting the majority's new formulation of probable cause, Justice Brennan agreed with Justice Stevens that the affidavit was still deficient.[118]

Justice Stevens' dissent focused on what he perceived was a material mistake in the informant's tip.[119] He believed that this inaccuracy undermined the issuing judge's finding of probable cause.[120] Thus, he concluded

Jaben v. United States, 381 U.S. 214, 223-24 (1965)). For a discussion of *Ventresca*, see notes 47-50 and accompanying text *supra*. For a discussion of *Jaben*, see note 50 *supra*.

According to Justice Brennan, the Court's prior cases directly contradicted the *Gates* majority's approach. 103 S. Ct. at 2358 (Brennan, J., dissenting) (citing Giordenello v. United States, 357 U.S. 480 (1958); *Nathanson*, 290 U.S. at 41). Such cases contradicted the *Gates* Court's allowance of a deficiency in one prong to be compensated by a strong showing in the other. *Id.* As the conclusory allegations by a police officer-affiant had been rejected in these cases, a conclusory allegation by an informant must similarly fail. *Id.*

Rather than departing from the two-pronged test, Justice Brennan argued that the Court should make clear that *Spinelli* was in no way a departure from the *Aguilar* test. *Id.* at 2357 (Brennan, J., dissenting). "Properly understood," Justice Brennan stated, *Spinelli* stood for the proposition that while corroboration of an informant's tip may satisfy *Aguilar*'s veracity prong, it could not satisfy the basis of knowledge prong. *Id.* at 2355 (Brennan, J., dissenting). Although Justice Brennan admitted that the majority opinion in *Spinelli* was ambiguous on this point, he found Justice White's concurrence in *Spinelli* "persuasive" as rejecting the notion that independent corroboration of a tip could serve to satisfy the basis of knowledge prong. *Id.* (citing *Spinelli*, 393 U.S. at 427 (White, J., concurring)). Justice Brennan further suggested that the corroboration had to be of "incriminating facts." *Id.* at 2355 n.5 (Brennan, J., dissenting) (citing *Spinelli*, 393 U.S. at 418). For a discussion of Justice White's concurrence in *Spinelli*, see note 61 *supra*.

116. 103 S. Ct. at 2359 (Brennan, J., dissenting). Justice Brennan stated that what was "[a]t the heart" of the majority's rejection of *Aguilar* was its perception that the *Aguilar* test was too great an impediment on the functions of law enforcement officials. *Id.* He attributed the Court's "impatience" to its view that " 'overly technical' rules" were governing searches and seizures under the fourth amendment. *Id.* While sharing the majority's concern for law enforcement, Justice Brennan pointed out that only those means *consistent* with the fourth amendment could be used to combat crime. *Id.*

117. *Id.* Justice Brennan noted with approval Justice White's concern that the majority's totality of circumstances test " 'may foretell an evisceration of the probable cause standard . . . .' " *Id.* (quoting 103 S. Ct. at 2334 (White, J., concurring)). While Justice Brennan conceded that the values of the fourth amendment may appear "unrealistic" to some, he viewed the majority's opinion as threatening to "obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law." *Id.* at 2359 (Brennan, J., dissenting) (quoting Johnson v. United States, 333 U.S. 10, 17 (1948)).

118. *Id.* at 2351 (Brennan, J., dissenting).

119. *Id.* at 2360 (Stevens, J., dissenting). As Justice Stevens pointed out, the anonymous letter stated that Sue Gates was to fly home, when in fact she drove home with her husband. *Id.* For a discussion of the circumstances leading to the issuance of the search warrant in *Gates*, see notes 1-8 and accompanying text *supra*. For a discussion of the majority's view of this discrepancy, see note 103 *supra*.

120. 103 S. Ct. at 2360 (Stevens, J., dissenting). According to Justice Stevens, the informant's error was material in three respects. *Id.* First, the informant had described a modus operandus that always left one of the Gates at home, which im-

that in viewing the totality of circumstances, the tip as corroborated by government officials could not furnish the basis for probable cause.[121]

In analyzing *Gates*, it is submitted that the majority's characterization of probable cause in terms of probabilities and not certainties, is an appropriate reminder of the probable cause standard.[122] Further, as the *Gates* majority noted, given the informal context in which an affidavit is prepared, hypertechnical scrutiny of an affidavit would appear inappropriate.[123] These two considerations render support for the *Gates* Court's rejection of an overly-technical approach to *Aguilar*'s two-pronged test.[124]

It is submitted, however, that the Court could have rejected an overly-

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plied that they were hiding something valuable there. *Id.* The fact that Sue Gates remained with her husband in Florida undermined this theory. *Id.* Second, the tip made the Gates' travel plans seem much more unusual than their actual itinerary was. *Id.* Justice Stevens argued that it was not uncommon for one spouse to fly down to meet the other on vacation. *Id.* at 2360 n.3 (Stevens, J., dissenting). Finally, Justice Stevens noted that the tip's inaccuracy undermined the majority's theory that because the informant had predicted with " '*considerable accuracy* the *somewhat unusual travel plans* of the Gates,' " a magistrate could reasonably infer that the informant had a reliable basis for his assertion that the Gates had a large amount of narcotics back in their home in Illinois. *Id.* at 2360 & n.4 (Stevens, J., dissenting) (quoting 103 S. Ct. at 2336 n.14).

121. 103 S. Ct. at 2361 (Stevens, J., dissenting). Justice Stevens surmised that nothing in the affidavit was unusual or indicated criminal activity. *Id.* Justice Stevens observed that although the anonymous letter asserted that Sue Gates had just driven down on May 3, "all the officers knew she had been in Florida for a month." *Id.* at 2360 n.1 (Stevens, J., dissenting). Justice Stevens also noted that the highway on which the Gates were driving at the time of the issuance of the warrant was used to travel to many vacation sites and did not necessarily indicate that a magistrate could predict at the time the warrant was issued that the Gates were returning to Illinois. *Id.* at 2360 n.3 (Stevens, J., dissenting). Thus, Justice Stevens surmised, the Court's finding of probable cause had "been colored by subsequent events." *Id.* at 2361 (Stevens, J., dissenting). However, it was axiomatic, that a warrant's validity can be based only on those facts or circumstances presented to the magistrate and " 'may not be rescued by post-search testimony on information known to the searching officers at the time of the search.' " *Id.* at 2361 n.6 (Stevens, J., dissenting) (quoting Rice v. Wolff, 513 F.2d 1280 (8th Cir. 1975), *rev'd*, 428 U.S. 465 (1976)).

Finally, Justice Stevens believed that the majority's reliance on *Draper* was misplaced. *Id.* at 2361 n.7 (Stevens, J., dissenting). Whereas in *Draper* the informant had previously relayed accurate information, in *Gates*, the informant's credibility was not only unknown, but he also had given inaccurate information. *Id.* Thus, Justice Stevens believed that under the majority's analysis, the " 'totality' . . . far exceed[ed] the sum of its 'circumstances.' " *Id.* at 2362 n.8 (Stevens, J., dissenting).

122. *See Brinegar*, 338 U.S. at 175. It is not necessary that all possibilities other than criminal conduct on the part of the suspect be eliminated. Livermore, *supra* note 72, at 958. For a discussion of the probable cause standard, see notes 21-24 and accompanying text *supra*.

123. *See Harris*, 403 U.S. at 573; *Ventresca*, 380 U.S. at 102.

124. *See* 103 S. Ct. at 2327-29. *See also id.* at 2350 (White, J., concurring). Lower courts, in their application of the *Aguilar* prongs, have frequently applied a hypertechnical approach similar to that which was expressly rejected by the Supreme Court in *Ventresca*. *See, e.g.*, Bridger v. State, 503 S.W.2d 801 (Tex. Crim. App. 1974). For a discussion of *Bridger*, see note 73 *supra*. By invalidating affidavits on the basis of overly severe scrutiny, a court risks a deviation from "a system of justice responsive

technical approach without abrogating the two-pronged test.[125] It is suggested that rejection of the *Aguilar* test may hinder, rather than aid, a magistrate's inquiry into probable cause.[126] A flexible approach within the framework of *Aguilar* would better serve the majority's concerns by providing magistrates with an analysis that would facilitate the determination of probable cause, and by protecting private citizens against unnecessary intrusions into their private lives, but without unduly hampering law enforcement officials.[127] The standard set forth in *Aguilar* ensures that a search or arrest will not be conducted based on a known or anonymous informant's tip without some showing that the informant is credible and the basis for his assertions is

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both to the needs of individual liberty and to the rights of the community" in effective law enforcement. *Ventresca*, 380 U.S. at 112.

An overly-technical approach to the probable cause standard would threaten to unduly hinder law enforcement. *See Brinegar*, 338 U.S. at 160. The closer the probable cause standard moves towards certainties, the more it eliminates the flexibility necessary for effective law enforcement. *See id.* at 176. The term "probable cause" contemplates that while citizens should be secure from unreasonable interference with their privacy, some leeway must be given for police mistakes. *Id.*

125. *See* 103 S. Ct. at 2350-51 (White, J., concurring). In fact, it is not the *Aguilar* prongs themselves with which the *Gates* majority appeared troubled. Rather, it was the overly technical *application* of the two-pronged test that had developed from lower court cases that gave the majority concern. *See id.* at 2332, 2334 n.12. The Court apparently viewed such overly technical applications of the *Aguilar* prongs as inevitable. *See id.* at 2331. It is not clear, however, why this should be the necessary result. *See id.* at 2350-51 (White, J., concurring).

126. *See id.* at 2358 (Brennan, J., dissenting). Given the haste of a criminal investigation and the fact that many magistrates are non-lawyers, magistrates may require more guidance than the Court has given in *Gates*. *Id.* The majority was concerned, however, that even assuming that the *Aguilar* prongs furthered the accurate assessment of probable cause, if they were applied by reviewing courts to invalidate searches conducted pursuant to warrants the police may resort to warrantless searches. *Id.* at 2331. The Court observed that the preference for warrants is based on the fact that the presence of a warrant reduces the individual's perception of the intrusiveness of a police officer's actions. *Id.* The reason that such a search is less intrusive is that the use of a warrant ensures that probable cause has been determined "by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Id.* at 2333 (quoting Johnson v. United States, 333 U.S. 10, 13-14 (1948)). Thus, the preference for a warrant assumes that the magistrate has performed his neutral and detached function in the first instance. *See* Johnson v. United States, 333 U.S. 10, 14 (1948). Therefore, a proper inquiry should enable the magistrate to assess accurately, in a neutral and detached manner, whether a tip establishes probable cause. *See Ventresca*, 380 U.S. at 108-09. That such a standard may invalidate some warrants would appear inconsequential. If the warrant were not issued based on probable cause in the first instance, the presence of a warrant would not appear to make the search any more valid and thus any less intrusive.

127. *See* 103 S. Ct. at 2350-51 (White, J., concurring). For example, the majority appeared concerned that an anonymous tip would seldom be able to pass "a rigorous application" of the *Aguilar-Spinelli* prongs. However, *Spinelli* itself provides a flexible standard, making allowance for the use of independent corroboration of details in an informant's tip to furnish support for the veracity prong in instances where the informant's honesty is unknown. For a discussion of the *Spinelli* Court's use of independent corroboration of an informant's tip in the probable cause analysis, see notes 61-62 and accompanying text *supra*.

reliable.[128]

It is submitted that Justice Brennan's standard, requiring corroboration of *incriminating* detail of an informant's tip, imposes a higher standard than probable cause requires.[129] Specifically, such a requirement fails to distinguish properly between the quanta of proof necessary to establish guilt and that necessary to show probable cause.[130]

It is further submitted that the totality of circumstances approach is not necessarily consistent with the Court's pre-*Aguilar* decisions. Rather, the decision in *Aguilar* is a more logical progression in the Court's development of standards by which to measure probable cause based on an informant's tip.[131] The informants' tips which the Court upheld in its pre-*Aguilar* cases appear capable of passing *Aguilar*'s two-pronged test.[132] It is further sug-

128. 103 S. Ct. at 2350 (White, J., concurring). It is submitted that a commonsense approach requires that both prongs of *Aguilar* be met. *See Supreme Court Review and Constitutional Law Symposium*, 52 U.S.L.W. 2228, 2229-31 (October 25, 1983) (remarks of Y. Kamisar) [hereinafter cited as *Symposium*].

129. *See* 103 S. Ct. at 2335 n.13. Corroboration of innocent detail does not negate the possibility that an informant is lying. Comment, *supra* note 13, at 967; Note, *supra* note 43, at 362-63. This argument, however, fails to consider the "common perception . . . that it is . . . dangerous to mislead the police by furnishing misinformation." Livermore, *supra* note 72, at 952. Admittedly, this consideration would have diminished application to an anonymous informant; because his identity is unknown he would not be subject to discipline if his report were false. On the other hand, an anonymous informant will not have been pressured by certain motives, such as monetary compensation or reduction in sentence, that may lead him to fabricate a report. For a discussion of the possible motives behind an informant's tip, see note 29 *supra*.

Furthermore, the issue should not be whether all other possibilities are eliminated other than that the suspect is in fact engaged in the criminal conduct alleged. Livermore, *supra* note 72, at 952. Rather, the issue should be whether the information is "more probably true than false," since the standard of probable cause is more probable than not. *Id.* at 946 n.7.

130. *See Brinegar*, 338 U.S. at 160.

131. Where the affiant's allegation of criminal conduct on the part of a suspect is based on the affiant's own observations, he is only required to set forth in the affidavit the basis for that allegation. *See Nathanson*, 290 U.S. at 41. When an affiant relates information from an informant, there is the added concern over the informant's credibility, especially in light of the possible motives of the informant to furnish false information.

132. *See, e.g., Rugendorf*, 376 U.S. at 528; *Ker*, 374 U.S. at 23; *Jones*, 362 U.S. at 257; *Draper*, 358 U.S. at 207. It is submitted that the tip in *Jones* contained enough indicia of both the informant's credibility and basis of his knowledge so as to pass *Aguilar's* two-pronged test. For a discussion of the affidavit in *Jones*, see notes 33-34 and accompanying text *supra*. For a discussion reconciling the *Jones* tip with the *Aguilar* tip, see note 43 *supra*.

Similarly, it is submitted that the tip in *Rugendorf* could pass the *Aguilar* standard. For a discussion reconciling *Rugendorf* with *Aguilar*, see note 43 *supra*. For a discussion of *Rugendorf*, see notes 39-41 and accompanying text *supra*. Furthermore, *Ker*, while advocating a totality of circumstances approach, is reconcilable with *Aguilar*. In *Ker*, there was evidence obtained from police investigation which was unrelated to the informant's tip. *Ker*, 374 U.S. at 25-28. This is consistent with *Spinelli* which distinguished between situations where there is information aside from the informant's tip and those situations where reliance is primarily on the informant's tip

gested that the Court's post-*Aguilar* cases did not dispense with *Aguilar*'s inquiry.[133] Even under a separate "substantial basis" approach, the Court's earlier pronouncements indicate that a "substantial basis" requires more of a showing than that found sufficient to establish probable cause in *Gates*.[134] Indeed, the use of a strong showing in one prong as a means of curing a deficiency in the other prong appears inconsistent with some earlier decisions by the Court on probable cause.[135] For instance, in *Nathanson*, the Court rejected the mere conclusory affidavit of a police officer as insufficient to establish probable cause.[136] Yet, allowing the use of a strong showing in one prong to support a deficiency in the other indicates that the conclusory allegations of a credible informant may pass constitutional muster under the Court's new approach.[137]

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itself. *Spinelli*, 393 U.S. at 415. For a discussion of *Ker* and its relation to *Aguilar*, see note 38 *supra*. Finally, *Draper*, which did not appear to inquire into the informant's basis of knowledge, appears reconcilable with *Aguilar* when examined in light of the Court's discussion of *Draper* in *Spinelli*. For an examination of the *Spinelli* Court's discussion of *Draper*, see notes 57-60, 62 and accompanying text *supra*.

133. *See, e.g.*, Adams v. Williams, 407 U.S. 143 (1972); *Harris*, 403 U.S. at 573; Jaben v. United States, 381 U.S. 214 (1965); *Ventresca*, 380 U.S. at 102. The reliance on *Williams* as standing for the proposition that a strong showing in one prong could serve to bolster a deficiency in the other prong would appear inapposite. *Williams* was not concerned with probable cause, but merely reasonable suspicion for a stop and frisk. *Williams*, 403 U.S. at 147. Since this is a less intrusive seizure, it does not require probable cause. For a discussion of *Williams*, see note 28 *supra*.

Harris is arguably the most difficult to reconcile with *Aguilar*, owing to language of the *Harris* Court that "*Aguilar* cannot be read as questioning the 'substantial basis' approach of *Jones*." *Harris*, 403 U.S. at 581. The *Harris* Court's approach, however, indicated that an inquiry into both prongs of *Aguilar* was the proper means for establishing probable cause. For a discussion of the *Harris* Court's reasoning, see notes 66-67 and accompanying text *supra*. *Jaben* is distinguishable due to the specific nature of the criminal activity involved: the filing of fraudulent income tax returns. *See Jaben*, 381 U.S. at 224-25. For a discussion of *Jaben*, see note 50 *supra*.

Finally, the Court in *Ventresca* appeared to state that a substantial basis approach nonetheless required satisfaction of the two-pronged test. For a discussion of this aspect of *Ventresca*, see note 50 *supra*. The *Ventresca* Court, while articulating a common-sense standard, made clear that this approach was to be applied within the framework set forth in *Aguilar*. For a discussion of *Ventresca*, see notes 47-50 and accompanying text *supra*.

134. Admittedly, the tip in *Gates* may have been insufficient to pass either prong of *Aguilar*. 103 S. Ct. at 2335-36. Therefore, *Gates* is distinguishable from other cases following the substantial basis approach. It is suggested that in these cases there was no doubt that the informant had an adequate basis of knowledge. *See, e.g., Harris*, 403 U.S. at 573; *Rugendorf*, 376 U.S. at 528; *Jones*, 362 U.S. at 257. Furthermore, the tip in each case appeared capable of passing *Aguilar's* veracity prong. For a discussion of *Harris*, see notes 63-67 and accompanying text *supra*. For a discussion of *Rugendorf*, see note 39-41 and accompanying text *supra*. For a discussion of *Jones*, see notes 31-35 and accompanying text *supra*.

135. *See, e.g.*, Giordenello v. United States, 357 U.S. 480 (1958); *Nathanson*, 290 U.S. at 41. For a discussion of the *Gates* majority's discussion on curing a deficiency in one of the prongs of the two-pronged test, see note 84 and accompanying text *supra*.

136. For a discussion of *Nathanson*, see notes 25-27 and accompanying text *supra*.

137. *See* 103 S. Ct. at 2350 (White, J., concurring). *See also id.* at 2358 (Brennan,

While it is unclear how the totality of circumstances approach will be applied in the future to different settings,[138] the approach may encroach

J., dissenting). The majority appears to continue to embrace the *Nathanson* principle that the mere conclusory statement of a police officer, without more, is insufficient to furnish the basis for a finding of probable cause. *Id.* at 2332 (citing *Nathanson*, 290 U.S. at 41). However, if an unquestionably honest informant can be excused from setting forth any of the underlying circumstances from which he derived his knowledge, it is difficult to see how an officer's mere conclusion that drugs were located in a specified place would not also constitute probable cause. *See id.* at 2350 (White, J., concurring); *id.* at 2358 (Brennan, J., dissenting). When a police officer-affiant swears out an affidavit, he is presumed to be honest since he is under oath. *Id.* at 2352 (Brennan, J., dissenting).

It is further submitted that the majority's reasoning allows an affiant to escape the impact of *Nathanson*. *See Aguilar*, 378 U.S. at 114 n.4. As observed by the *Aguilar* Court, a police officer could tell a fellow officer of his conclusory allegations of criminal conduct, and the second officer could then obtain a warrant by swearing that he had received information from a credible person that a suspect was engaged in narcotics activities. *Id.*

138. LaFave, *Nine Key Decisions Expand Authority to Search and Seize*, 69 A.B.A. J. 1740, 1744 (Nov. 1983). Some lower courts have already interpreted *Gates* as allowing a showing in one prong to replace the need for any showing in the other. *See, e.g.*, United States v. Peyko, 717 F.2d 741, 743 (2d Cir. 1983) (per curiam); United States v. Kolodziej, 712 F.2d 975, 977 (5th Cir. 1983) (per curiam). In *Kolodziej*, the court stated that even in the absence of facts indicating the informant's basis of knowledge, probable cause may still be found if the informant is unquestionably credible. 712 F.2d at 977.

But see United States v. Sorrells, 714 F.2d 1522 (11th Cir. 1983); United States v. Ross, 713 F.2d 389 (8th Cir. 1983). In *Sorrells*, the court noted that under *Gates* each of *Aguilar's* prongs was no longer to be treated as a "separate entity." *Sorrells*, 714 F.2d at 1528. Nevertheless, the court was quick to caution on the demise of *Aguilar's* prongs: "[I]t is not anticipated that departure from these guidelines will be looked upon with favor." *Id.* at 1529. In *Sorrells*, the affidavit provided a strong showing as to the informant's basis of knowledge. *See id.* at 1526-28. The court upheld the warrant, but only after noting that the affidavit provided facts indicating the informant's veracity, including independent corroboration of parts of the informant's tip. *Id.* at 1528-29. Similarly, in *Ross*, the court explained that under *Gates, Aguilar's* prongs are no longer independent requirements. 713 F.2d at 393. Once again the informant's basis of knowledge was not at issue. *Id.* In upholding the warrant, the court pointed out that the informant, whose name was disclosed in the affidavit, was a local citizen and not a professional informant. *Id.* As such, the court observed that the informant had no motive to lie and thus there were none of the "attendant credibility concerns" that existed in the case of a professional informant. *Id.*

Sorrells and *Ross* appear to interpret *Gates* as not allowing a showing in one prong to *replace* the other prong entirely. *See Sorrells*, 714 F.2d at 1528-29; *Ross*, 713 F.2d at 393. Rather, they view *Gates* as allowing "a deficiency in one part of the *Aguilar* test [to] be compensated through a stronger showing of the other prong." *Sorrells*, 714 F.2d at 1528. *See also Symposium, supra* note 128, at 2230. In Professor Kamisar's opinion, *Gates* may be interpreted as holding that a *gross* deficiency in one prong may not be compensated by an "overkill" in the other. *Symposium, supra* note 128, at 2230 (remarks of Y. Kamisar). Only after there is a "threshold of supporting facts" bearing on each prong may a strong showing in one prong bolster a deficiency in the other. *Id.*

It is indeed possible that the two-pronged framework may have survived *Gates*, although in a watered-down fashion. *Id.* The Court in *Gates* made inquiry into both the informant's veracity and the basis of his knowledge. 103 S. Ct. at 2334-36. The Court further noted the use of corroboration of the tip to support the veracity of the

upon the probable cause standard.[139] Not only will the *Gates* decision affect the sufficiency of an affidavit which is based on an informant's tip, but the decision may also presage a relaxation of the probable cause standard in contexts where an informant is not involved. If a credible informant may be excused from fully setting forth his basis of knowledge, it would seem that a police officer-affiant should similarly be excused.[140]

One question left open after *Gates* is the applicability of the Court's totality of circumstances approach to warrantless searches and warrantless arrests.[141] Much of the Court's reasoning for abrogating the *Aguilar* test ap-

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informant. *Id.* at 2334-35. Similarly, the Court looked at the amount of detail in the tip when it assessed the informant's basis of knowledge. *Id.* at 2335-36.

The two Supreme Court cases that have expressly applied the "substantial basis" approach do not seem helpful in evaluating the limits of the totality of circumstances approach. *See, e.g., Harris*, 403 U.S. at 573; *Jones*, 362 U.S. at 257. The tip in *Jones* would likely have passed the traditional two-pronged test. For a discussion of *Jones*, see notes 31-35 and accompanying text *supra*. *Harris* is arguably consistent with *Aguilar* as well. For a discussion reconciling *Harris* with *Aguilar*, see note 67 *supra*.

On the facts of *Gates*, it is difficult to see any difference between the totality of circumstances approach and Justice White's flexible application of the *Aguilar* test. The approaches of both the majority and Justice White allow the use of independent police corroboration to satisfy *both* prongs of *Aguilar*. 103 S. Ct. at 2334-35; *id.* at 2348-49 (White, J., concurring). Similarly, both approaches permit corroboration of innocent as well as suspicious activity to elevate a tip so as to constitute probable cause. *Id.* at 2335 n.13; *id.* at 2348 (White, J., concurring).

139. *Symposium, supra* note 128, at 2230 (remarks of Y. Kamisar); LaFave, *supra* note 138, at 1744. The *Gates* Court cited with approval Chief Justice Marshall's formulation of probable cause as something which "imports a seizure made under circumstances which warrant suspicion." 103 S. Ct. at 2330 (quoting Locke v. United States, 11 U.S. (7 Cranch) 339, 348 (1813)). "Suspicion", however, was rejected previously by the Court as being an insufficient formulation of probable cause. *See Brinegar*, 338 U.S. at 175. The reasonable suspicion standard is not the standard for probable cause for search or arrest; rather it is the standard for the less intrusive seizure of a "stop and frisk." *See* Terry v. Ohio, 392 U.S. 1, 22 (1968). It is suggested that another aspect of the *Gates* opinion may indicate a movement in probable cause analysis towards the lesser standard of the stop and frisk. One case that the majority relied on for the proposition that a strong showing in one prong may cure a deficiency in the other, was not concerned with a showing of probable cause, but merely with reasonable suspicion for a stop and frisk. *See* Adams v. Williams, 407 U.S. 143 (1972). Writing for the majority in *Williams*, Justice Rehnquist noted that the facts in that case were probably insufficient to establish probable cause, even though the informant was said to be more reliable than an anonymous telephone tip. *Id.* at 146-47. Yet, after *Gates*, it would appear that the *Williams* tip could, under the totality of circumstances approach, provide the basis for probable cause. *See* 103 S. Ct. at 2329. If so, then the probable cause standard for search or arrest and the standard for a stop and risk would be interchangeable. For a discussion of *Williams* and *Terry*, see note 28 *supra*.

It should be noted that of the examples the Court set forth in which a deficiency in one prong could be compensated by a strong showing as to the other, the facts in *Gates* do not appear to fall within any of them. The Court itself noted that the tip in *Gates* may have been insufficient to pass either prong. *See* 103 S. Ct. at 2335-36.

140. 103 S. Ct. at 2350 (White, J., concurring). "It would be 'quixotic' if a similar statement from an honest informant, but not one from an honest officer, could furnish probable cause." *Id.*

141. *See Symposium, supra* note 128, at 2230 (remarks of Y. Kamisar).

plies only where a warrant has been validly obtained.[142] Nevertheless, as the development of the standard for determining the validity of a warrantless search or arrest has paralleled that developed for searches and arrests made pursuant to a warrant,[143] it is suggested that the standard announced in *Gates* may well be applied to searches and seizures conducted without a warrant.[144]

Although the *Gates* Court declined to address the issue of whether there should be a good faith exception to the exclusionary rule,[145] it is submitted that nevertheless the *Gates* decision may indeed have some impact in this area.[146] If the standard in *Gates* is extended to apply to warrantless searches and seizures,[147] any distinction between the standard for determining whether the seizure is valid under *Gates* and the standard for determining whether evidence should be admissible under a good faith exception to the exclusionary rule may become somewhat blurred.[148] In the context of a

142. *Id.* Some of the principal reasons the *Gates* Court gave for adopting the totality of circumstances approach are inapposite in the context of a warrantless search or seizure. These include the Court's concern about discouraging police from seeking warrants, its traditional deference to a magistrate's determination, and its desire not to subject affidavits to hypertechnical scrutiny. *See id. See also* 103 S. Ct. at 2330-32.

143. For a discussion of the probable cause standard in the context of searches and seizures conducted both with and without a warrant, see note 13 *supra*.

144. *Symposium, supra* note 128, at 2230 (remarks of Y. Kamisar). In abandoning the *Aguilar* approach, the *Gates* Court also emphasized the impediment of the rigid two-pronged test on law enforcement activities. *Id.* This concern appears equally applicable to warrantless search or arrest situations. *Id.*

But see United States v. Freitas, 716 F.2d 1216 (9th Cir. 1983). In *Freitas*, the court interpreted *Gates* as distinguishing between the function of a court in reviewing a warrantless search or arrest and one conducted pursuant to a warrant. *Id.* at 1225. If a warrant has been obtained, the reviewing court need only find a "substantial basis" for the magistrate's determination of probable cause. *Id.* However, the court suggested that in reviewing a police officer's own decision to conduct a warrantless search or arrest less deference should be accorded. *Id.* In reviewing probable cause for a warrantless search or arrest a reviewing court should utilize its own independent judgment. *Id.* Under this interpretation, *Gates* implicitly requires different standards for probable cause, depending on whether or not a warrant was obtained for the search or arrest. *Id.*

145. 103 S. Ct. at 2321. For a discussion of this aspect of *Gates*, see notes 12 & 76 *supra*.

146. *See Symposium, supra* note 128, at 2230 (remarks of Y. Kamisar); LaFave, *supra* note 138, at 1748 ("the essential fact of *Gates* is that it contemplates much greater deference . . . to the judgment of the officer or magistrate who made the initial probable cause decision").

147. For a discussion of the question whether the totality of circumstances approach applies to warrantless searches and seizures, see notes 141-44 and accompanying text *supra*.

148. If *Gates* applies to warrantless searches and seizures, a reviewing court would not invalidate the search or arrest so long as the officer had a "substantial basis" for crediting the informant's tip. *See* 103 S. Ct. at 2332. Under the substantial basis approach set forth in *Jones*, there must be "so little basis for accepting the hearsay" to invalidate the search. *See Jones*, 362 U.S. at 271. It is suggested that this standard is not unlike the standard articulated by Justice White in his concurrence in *Gates* on the question of when a policeman's conduct would come within the bounda-

search or seizure conducted pursuant to a warrant, the *Gates* standard may inform the judge on the separate exclusionary rule issue when the judge decides whether the officer acted with a good faith belief so as to justify the admission of the evidence obtained during the search.[149]

It is also submitted that the Court's holding in *Gates* may be symptomatic of judicial dissatisfaction with the idea that probative evidence may be excluded at trial at the expense of public interest in law enforcement.[150] This dissatisfaction may signal the outcome this Term[151] when the Court addresses whether there should be a good faith exception to the exclusionary rule, the issue that it declined to decide in *Gates*.[152]

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ries of a good faith exception to the exclusionary rule. *See* 103 S. Ct. at 2344 (White, J., concurring). According to Justice White, a policeman's conduct could not come within the good faith exception when the circumstances were "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Id.* (quoting Brown v. Illinois, 422 U.S. 590, 610-11 (1975) (Powell, J., concurring)). *See also* LaFave, *supra* note 138, at 1748. "If, as *Gates* claims, probable cause is simply a 'common sense' matter, then any probable cause determination that is erroneous and thus lacking in common-sense is undeserving either of the appellation 'good faith' or the sympathetic reception a 'good faith' exception would allow." *Id.* For a discussion of Justice White's analysis of the good faith issue in *Gates*, see note 104 and accompanying text *supra*.

149. *See Symposium, supra* note 128, at 2231 (remarks of Y. Kamisar). The *Gates* standard "in effect adopts the good-faith theme" in the context of a search warrant. *Id.* "It is 'almost ludicrous' . . . to say that if the police conducted a warrant search that turned out to lack even a 'substantial basis' for a 'fair probability' that evidence would be found, the evidence should *nevertheless* be admissible if the police acted in 'reasonable, good faith.' " *Id.*

150. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 496 (1976) (Burger, C.J., concurring); *id.* at 537-38 (White, J., dissenting); United States v. Peltier, 422 U.S. 531, 542 (1975) (Rehnquist, J.); Brown v. Illinois, 422 U.S. 590, 609 (1975) (Powell, J., concurring in part). *See also* 103 S. Ct. at 2359 (Brennan, J., dissenting).

151. For a summary of the cases presenting the good faith exception issue on which the Supreme Court has granted certiorari, see note 12 *supra*.

152. For a discussion of the Court's analysis on the propriety of addressing the issue in *Gates* of whether there should be a good faith exception to the exclusionary rule, see note 76 and accompanying text *supra*.